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No. _____

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IN THE

Supreme Court of the United States

October Term 1992

JAMES EDWARD SMITH, and
RICHARD LEANDER SMITH,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a trial for substantive drug possession and distribution offenses, the admission of evidence of conduct which formed the basis for a conspiracy charge to which petitioner had previously pled guilty, in a separate prosecution, violated his rights under the Double Jeopardy Clause of the Fifth Amendment?

2. Whether, in the absence of a charge of conspiracy, admission of proof of other crimes which occurred over a twenty year period, under Federal Rule of Evidence 404(b), when those crimes were admitted to prove facts not in issue, and for the specific purpose of trying the defendant for his entire history of drug dealing, violated Federal Rule of Evidence 404(b), and denied petitioner his right to due process of law

under the Fifth Amendment?

3. Whether a criminal defendant must take some affirmative action to make the voluntariness of his confession an issue at trial, in order to be entitled to a jury instruction on the issue, pursuant to 18 U.S.C. §3501?

LIST OF PARTIES

The parties to the proceedings below were petitioners, James E. Smith, and Richard L. Smith, and the respondent, the United States of America.

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APPLICABLE PROVISIONS OF LAW

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be ... subject for the same offense to be twice put in jeopardy of life or limb ... or be deprived of life, liberty, or property, without due process of law...."

STATUTORY PROVISIONS

Federal Rule of Evidence 404(b) provides in pertinent part, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...."

Federal Rule of Evidence 403 provides

in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, ... or needless presentation of cumulative evidence."

18 U.S.C. §3501 provides, in pertinent part, "If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between

arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. _____

JAMES EDWARD SMITH, AND
RICHARD LEANDER SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, James E. Smith and Richard L. Smith, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled

proceedings on June 10, 1992.

OPINIONS BELOW

The unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit is reprinted in the appendix. (App. 1-10).

The judgement of the United States District Court for the Eastern District of Virginia is reprinted in the appendix. (App. 11-16).

JURISDICTION

The judgement of the United States Court of Appeals for the Fourth Circuit was entered on June 10, 1992. By order of this Court dated August 25, 1992, petitioners' time within which to file their Petition for Writ of Certiorari was extended to October 8, 1992. (App. 17).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. The Proceedings Below

In August, 1990, petitioners James E. Smith (hereinafter "James"), and Richard L. Smith (hereinafter "Richard") and their co-defendant, Olivia Bratton, were indicted in the Eastern District of Virginia for a number of primarily drug trafficking offenses. (App. 18-48). Specifically, James was indicted on two counts of using a telephone to facilitate drug trafficking, 21 U.S.C. §843(b), one count of possession of a firearm by a convicted felon, 18 U.S.C. §922(g), one count of distribution of heroin, 21 U.S.C. §841(a)(1), one count of interstate travel to promote drug trafficking, 18 U.S.C. §1952(a), one count of possession with intent to distribute heroin, 21 U.S.C. §841(a)(1), and one count of participation in a drug trafficking conspiracy, 21

U.S.C. §846. Richard was indicted on telephone, interstate travel and possession with intent to distribute heroin counts, as well as two counts of distribution of heroin, 21 U.S.C. §841(a)(1), one count of distribution of cocaine, 21 U.S.C. §841(a)(1), and one drug trafficking conspiracy count, 21 U.S.C. §846. The indictment was based on allegations that, while incarcerated on charges pending in the District of Columbia, James conspired with Bratton and Richard, among others, to transport and distribute heroin and cocaine which petitioners had stored in apartments in the Washington metropolitan area. The United States District Court for the Eastern District of Virginia had jurisdiction over the matter pursuant to 18 U.S.C. §3231.

The district court, by order dated February 20, 1991, dismissed the conspiracy charge against petitioner James Smith on the grounds that his plea to the conspiracy charges in the District of Columbia was a double jeopardy bar to prosecution on that charge, it being the same conspiracy. (App. 51-52).

Petitioners and Bratton were tried together. The jury acquitted James on one count of using a telephone to facilitate a drug transaction, and convicted him on all other counts. Richard was convicted on six of seven counts, including the conspiracy count, and Bratton was acquitted of all charges. The district court denied all post-trial motions and sentenced petitioner under the federal sentencing guidelines.

Petitioners filed their Notice of Appeal to the United States Court of

Appeals for the Fourth Circuit on May 23, 1991 (App. 53-54). On June 10, 1992, the Court of Appeals affirmed the convictions. By order dated August 25, 1992, this Court extended the time for filing this petition until October 8, 1992.

B. The Facts in This Case

On March 16, 1988, petitioner pled guilty in the District of Columbia to a charge of conspiracy to distribute narcotics, and was sentenced to a term of 35 years in prison. At the trial on the charges petitioners now appeal, the Government introduced, over their objections, massive evidence regarding the conduct that formed the basis of James' prior conviction, as well as other prior acts by him. That evidence included particulars of James' twenty year history of drug dealing, and details as to costs and methods of distribution in the early

seventies and even late sixties.

Specifically, the government introduced testimony of DeVoyce Gay Caviness which related solely to the D.C. conspiracy, and was unrelated to the crimes with which petitioner was charged in the Eastern District. Ms. Caviness testified that, in 1984, she started dealing heroin by going by to see James, that he became her supplier, that she stopped dealing when she became pregnant, that she went back to James after her pregnancy to begin dealing again, and that she continued to deal until she was arrested in 1987. (App. 55-69). She also testified that she did not know who else was in petitioner's organization, and that she did not know where he distributed heroin. (App. 55-69). She had no knowledge of anything related to the offenses charged.

The government also introduced the testimony of Veronica Baker, which related only to the sting conducted against James which resulted in his arrest and conviction in the District of Columbia, and was irrelevant to the charges in the Eastern District of Virginia. (App. 70-80). Baker's testimony was particularly prejudicial, because it was the only testimony from a non-trafficker directly linking James to the distribution of drugs. Baker provided eyewitness police testimony placing petitioner in actual possession of a substantial amount of narcotics, even though those narcotics were not related to the offenses charged. (App. 70-80).

The government also introduced the testimony of Barbara Lyles, a policewoman from the District of Columbia, which again related solely to the D.C. conspiracy

charge and not to the Eastern District charges. Lyles testified as to her attempts to engage James in drug transactions in 1985. (App. 81-93). Specifically, she testified as to a meeting she had with him in that year, in which James indicated his ability to secure various narcotics for her, and discussed certain details of drug dealing. (App. 81-93). She also produced a tape of that conversation, which was played for the jury. (App. 81-93). Again, the testimony was unrelated to the offenses charged.

Over defense objection, James R. Smith, Charles Smith and Excel Alexander testified at length as to the entire history of their drug transactions with James, spanning some twenty years. (App. 91-105, 106-119, 120-127). These witnesses were allowed to testify to the

following facts: how they came to deal drugs for and with James (App. 91-105, 106-119, 120-127); how they purchased drugs from him (App. 91-105, 106-119, 120-127); how they made deliveries for him (App. 91-105, 106-119, 120-127); that the witnesses had a "steady stream of customers" (App. 91-105, 106-119, 120-127); that James would not identify his sources because he did not want James R. Smith to obtain drugs directly from them (App. 91-105, 106-119, 120-127); that James "cut [the witness] off" years earlier (App. 91-105, 106-119, 120-127); and the cost of drugs in 1970. (App. 91-105, 106-119, 120-127).

The government introduced against Richard a statement obtained from him by the drug task force. Richard was induced to meet with the officers by a note that was left with his wife, stating that he

would "be able to save himself some serious problems by talking with [them]." (App. 129). At that meeting, Richard gave the statement. The district court denied Richard's motion to suppress the statement, and subsequently refused to instruct the jury on the issue of voluntariness.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's per curiam decision decides an important question of law which should be addressed and decided by this court. In U.S. v. Felix, ___ U.S. __, ___ S. Ct. ___, 118 L.Ed.2d 25 (1992), this Court applied its holding in Grady v. Corbin, 495 U.S. 508 (1990), and held that prosecution of a defendant for conspiracy, where certain of the overt acts of that conspiracy are based on substantive offenses for which the defendant has been previously prosecuted, does not violate

the Double Jeopardy clause.

In this case, however, the opposite fact pattern emerged. James was first convicted of the conspiracy, and evidence of that conspiracy was then used against him in a subsequent prosecution for substantive offenses arising from that same conspiracy. The Fourth Circuit, citing Grady, held that this prosecution did not violate the Double Jeopardy clause, without distinguishing petitioner's situation from that in Grady and other Fourth Circuit decisions applying Grady. Since both the logic and policy considerations behind Grady and its progeny are not applicable to this situation, this Court must decide this important issue of law.

In addition, the Fourth Circuit's decision that the evidence of James' twenty-year long participation in drug

distribution was admissible under Federal Rule of Evidence 404(b) conflicts with prior decisions of this Court and other circuit courts.

This Court has stated that the "threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." Huddleston v. United States, 485 U.S. 681, 686 (1988). In this case, the Fourth Circuit found that the evidence of James' participation in a past conspiracy was properly admitted to show intent, motive, and common scheme. However, none of these facts were in issue in his case, and thus the Court erred by admitting the evidence under Rule 404(b). Furthermore, the Fourth Circuit's decision is based on an application of Federal Rule of Evidence 404(b) which conflicts with

the views of the other Circuit Courts of Appeals as to when a 404(b) factor is at issue.

Finally, the district court clearly erred by refusing to submit the issue of voluntariness to the jury, as 18 U.S.C. §3501 contemplates. This Court should consider the question of whether, as the Fourth Circuit held, the defendant must take some undescribed affirmative action to place the question of voluntariness before the jury.

ARGUMENT

I. THE ADMISSION OF EVIDENCE OF CONDUCT COVERED BY PETITIONER'S PRIOR GUILTY PLEA TO A CONSPIRACY CHARGE IN A SUBSEQUENT PROSECUTION FOR SUBSTANTIVE OFFENSES, COMMITTED AS PART OF THAT CONSPIRACY BEFORE ENTRY OF HIS PLEA, VIOLATED HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

In these proceedings for substantive drug and firearm offenses, the

overwhelming majority of the government's evidence consisted of conduct that was part of the conspiracy to which James had already pled guilty in the District of Columbia. A thorough reading of the record in this case leads to the inevitable conclusion that the introduction of this evidence resulted in, as a practical matter, a retrial in the Eastern District of Virginia for the same conduct to which he pled guilty in the District of Columbia. Such a result conflicts with the nature and purposes behind the Double Jeopardy Clause.

A. The Logic And Policy Justifications For This Court's Decision In Felix Are Not Applicable To Cases In Which Evidence Of Conduct Underlying A Conspiracy Charge Is Introduced In A Subsequent Prosecution For Substantive Offenses

The Double Jeopardy Clause bars a subsequent prosecution for conduct which has already been prosecuted. The

Government's case consisted largely of evidence of James' drug trafficking prior to his guilty plea to conspiracy in the District of Columbia, all of which was part of, and in furtherance of, that conspiracy. The government introduced the testimony of DeVoyce Gay Caviness, who knew only of her dealings with James prior to his arrest in D.C. (App. 55-69), the testimony of Veronica Baker as to the transactions leading up to his arrest in D.C. (App. 70-80), and the testimony of Barbara Lyles as to his distribution of drugs in 1985, including a tape recording of a transaction from that year. (App. 81-93). In addition, the Government introduced substantial testimony from both James Reginald Smith, Charles Smith and Excel Alexander relative to their dealings with James over a twenty-year period. (App. 91-105, 106-119, 120-127).

In Grady, this Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in the prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 495 U.S. at 510. After the ruling in Grady, the Courts of Appeals differed in determining what effect Grady would have on a subsequent prosecution for conspiracy when a defendant had previously been prosecuted for the substantive offenses which constituted the overt acts of that conspiracy. See United States v. Calderone, 917 F.2d 717 (2nd Cir. 1990); contra United States v. Rivera-Feliciano, 930 F.2d 951 (1st Cir. 1991).

In United States v. Felix, this Court resolved the split in the circuits, and

held that Grady did not prevent the prosecution of a defendant for conspiracy, where certain of the overt acts of that conspiracy were based on substantive offenses for which the defendant had previously been convicted. This Court's holding was consistent with the approach taken by the Fourth Circuit on that exact fact pattern, i.e. a conspiracy prosecution following a prosecution for the substantive offenses. See, United States v. Clark, 928 F.2d 639 (4th Cir. 1991).

In United States v. Arnoldt, 947 F.2d 1120 (4th Cir. 1991), the Fourth Circuit explained the reasoning behind its holding in Clark. While recognizing the "weighty concerns" of the Double Jeopardy Clause, the court stated that barring the conspiracy prosecution once the defendant had been prosecuted for the underlying

substantive offenses would "unduly infringe prosecutorial discretion and effectively `force the Government's hand'". 947 F.2d at 1127. Specifically, the court felt that, without such discretion, "the government would be forced either to proceed against a defendant for violations that might later serve as predicate acts and foreclose a RICO prosecution in the future or allow predicate acts to go unpunished in anticipation that at some future time the RICO elements would coalesce". Id.

Clearly, these concerns are not present in this case, for the exact opposite fact pattern exists. Here, the government had already prosecuted James for the conspiracy, and used evidence of this conspiracy to prove substantive drug and firearms offenses that were part of the conspiracy. In such a scenario, the

government is not forced to idly sit by and watch offenses being committed, nor is it forced to chose between prosecuting the conspiracy or the underlying offenses. Barring the use of evidence of the conspiracy in this case, and others like it, would simply require the government to prosecute the overt acts at the same time it prosecutes the conspiracy.

The result reached by the Fourth Circuit allowing subsequent prosecution would conflict with the basic principle behind the Double Jeopardy Clause, that the government "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity." Green v. United States, 355 U.S. 184, 187

(1957). The instant prosecution has violated this principle. By introducing massive amounts of evidence covered by James' prior D.C. conspiracy conviction, the government was able to secure a conviction in the Eastern District trial by retrying defendant for the D.C. conspiracy.

In order to determine the applicability of Grady to the reverse scenario presented in Felix, this Court should grant the writ of certiorari.

II. PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT WAS VIOLATED BY THE WHOLESALE INDISCRIMINATE ADMISSION OF PROOF OF OTHER CRIMES WHEN PETITIONER DID NOT CONTEST ANY VALID PURPOSE FOR RULE 404(B) EVIDENCE

As noted above, much of the evidence introduced by the Government consisted of "other crimes" evidence, which was irrelevant to the crimes with which the petitioner was charged. The Fourth

Circuit upheld the admission of this evidence pursuant to Rule 404(b) of the Federal Rules of Evidence, despite the fact that none of the enumerated factors in Rule 404(b) were in dispute. To the extent any of that evidence was relevant, its prejudicial effect clearly outweighed its probative value.

In Spencer v. Texas, 385 U.S. 554, 569 (1967), a majority of this Court accepted the proposition that evidentiary issues could implicate constitutional due process protections.[1] Grady implicitly recognized the same principal. Here, the rulings of the District Court and the Fourth Circuit both violated the clear

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[1] Spencer was a 4-1-2-2 decision. The fifth vote for affirmance of the convictions was provided by Justice Stewart, who implicitly recognized the constitutional due process protections at issue here. Thus, a majority of this Court accepted that proposition.

mandates of the Federal Rules of Evidence, and the right to due process of law that Rule 403 and 404(b) are intended to protect. Rule 404(b) of the Federal Rules of Evidence provides for the limited admission of "prior crimes" evidence. Such evidence is admissible to prove various enumerated issues other than character, if those issues are material and in dispute. Huddleston v. United States, 485 U.S. 681, 686 (1988)(emphasis added). The admission of prior crimes evidence is "`not looked on favorably and its use must be narrowly circumscribed and limited.'" United States v. Rivera, 837 F.2d 906, 911 (10th Cir. 1988), quoting United States v. Lewis, 787 F.2d 1318, 1321 (9th Cir. 1986). Even if the prior crimes evidence is probative of one of the factors identified in Rule 404(b), and that factor is a material, contested

element in the instant case, the court must determine whether its probative value is outweighed by its prejudicial effect. Huddleston, 485 U.S. at 687.

A. The Fourth Circuit's Decision To Uphold The Admission Of The Prior Crimes Evidence Despite The Lack Of Dispute As To Any Of The Factors Mentioned In Rule 404(b) Conflicts With A Prior Decision Of This Court And Is In Conflict With Decisions Of Other Circuits

The Fourth Circuit held that the evidence involving the prior conspiracy was properly introduced to show James' intent to possess and distribute narcotics. (App. 1-10). The circuit courts have recognized various defenses which, if claimed by the defendant, will clearly place the defendant's intent in issue, thus satisfying Huddleston's requirement that the implicated 404(b) element be both material and at issue. See, e.g., United States v. Hearst, 563

F.2d 1331 (9th Cir. 1977) (duress); United States v. Henciar, 568 F.2d 489 (6th Cir. 1977) (entrapment); United States v. Smith, 552 F.2d 257 (8th Cir. 1977) (intoxication). Likewise, if the defendant provides an innocent explanation for his act, prior crimes evidence will be admissible to show his intent to commit a criminal act. See, e.g., United States v. Dworken, 855 F.2d 12, 27 (1st Cir. 1988).

In fact, petitioner rested his case without presenting any evidence. Unless and until petitioner disputed the issue of intent, it was not a material factor in issue. See United States v. Rivera. A defendant's claim that he did not perform the criminal acts at all does not place intent in dispute. United States v. Colon, 880 F.2d 650 (2nd Cir, 1989). However, from the decision in this case, it is clear that the Fourth Circuit rule

is otherwise, that the denial of the acts themselves puts motive and intent at issue for the purposes of Rule 404(b).

The testimony of Caviness, Baker, Lyles, and the Smiths were unrelevant to the actual crimes charged. The mere fact that James possessed and distributed narcotics in the past is not indicative of his intent to do so at a later time. The Fourth Circuit's mere recitation that this evidence is indicative of intent masks the fact that this evidence was, in reality, evidence of petitioner's propensity to commit similar crimes - the exact inference forbidden by Rule 404(b).

Even if intent were a material factor in dispute in petitioner's case, the evidence proffered was not relevant to his intent as to these charges, and its prejudicial effect outweighed its probative value. Possession of cocaine at

one point in time does not create an inference of possession nineteen months earlier, without relying on an impermissible assessment of the defendant's character. United States v. Garcia-Rosa, 876 F.2d 209 (1st Cir. 1989); Remarkably, in the instant case, the government rejected James's offer to stipulate that he'd been a drug dealer for two decades, specifically so that it could try his entire history of drug dealing in graphic and irrelevant detail. (App. 128).

The Fourth Circuit held that the evidence of the prior conspiracy was also properly introduced to show petitioner's motives in undertaking certain actions and dealing with certain persons. (App. 1-10). Again, James' motive was not a material factor in this case, nor was it a factor placed in dispute by him as

required by Huddleston. The Fourth Circuit's decision, which endorses the admission of such evidence merely upon a denial of the acts charged, is thus in conflict with the decisions of other circuits.

In most situations, prior crimes are introduced as evidence of motive in order to show a defendant's reasons for committing the charged crimes. Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence Manual, ¶7.01[9] (1992). For example, prior crimes have been admitted to show that the defendant committed the crime because he needed money (United States v. Shriver, 842 F.2d 968 (7th Cir. 1988)), or drugs (United States v. Troop, 890 F.2d 1393 (7th Cir. 1989)), or because he sought to conceal a previous crime (United States v. Kerr, 778 F.2d 690 (11th Cir. 1985)), escape after

committing a previous crime (Hernandez v. Cepeda, 860 F.2d 260 (7th Cir. 1988)), or to silence a potential witness (United States v. Willoughby, 860 F.2d 15 (2nd Cir. 1988)).

None of these factual situations are present in this case. Clearly, the inclusion of motive in Rule 404(b) was not intended to be of such broad scope as to permit a showing of a defendant's motive for dealing with certain persons, or for taking certain actions that do not establish the commission of the crime. In fact, introduction of prior crimes under the guise of proving motive in these situations is actually introducing those crimes to show defendant's character to commit crimes - the exact prohibition of Rule 404(b). The Fourth Circuit's decision in this case effectively abolishes Rule 404(b) as a limitation upon

the admission of other crimes evidence.[2]

In the instant case, there can be no

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[2]. The Fourth Circuit stated, without analysis, that "[d]etails of the [D.C.] operations also revealed similarities between the charged conduct and the previous operations - evidence of a common plan or scheme." (App. 1-10).

In order to be admissible for the purpose of showing a common plan or scheme, the evidence must be close in time to the charges for which petitioner is being tried. United States v. Smith, 727 F.2d 214, 219-21 (2nd Cir. 1984); United States v. Lemaire, 712 F.2d 944 (5th Cir. 1983). Stale transactions are not admissible to show a common plan or scheme see, Garcia-Rosa.

Moreover, the testimony of the prior transactions was obviously different in character than the unique circumstances involved in the alleged plot which formed the basis of the charges for which petitioner was being tried. Evidence of prior bad acts used to show a common scheme or plan must be "so nearly identical in method as to earmark them as the handiwork of the accused. [M]uch more is demanded than the mere repeated commission of crimes of the same class.... The device used must be so unusual and distinctive as to be like a signature." United States v. Bennedetto, 571 F.2d 1246, 1249 (2nd Cir. 1979).

debate as to the government's purpose in proffering the 404(b) evidence, since, in rejecting petitioner's offer to stipulate that he had been a drug dealer for two decades, the prosecutor candidly admitted that he intended to try petitioner for his history of drug dealing. Incredibly the courts below condoned the use of this evidence without even bothering to conduct the required prejudice analysis under Federal Rule of Evidence 403, in the face of an admittedly improper government purpose.[3]

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[3]. Also, contrary to the approach of other circuits, the Fourth Circuit condoned, in this case, the admission of 404(b) evidence, for the purposes of proving motive or intent, in the government's case-in-chief.

The Second Circuit has held that evidence of prior crimes cannot be used in the government's case-in-chief to prove intent merely because the defendant entered a plea of not guilty. United States v. Reed, 639 F.2d 896 (2nd Cir. 1981). Rather, such evidence will be allowed only in rebuttal if the defendant placed intent in issue during the

III. PETITIONER RICHARD L. SMITH WAS ENTITLED TO A JURY INSTRUCTION AS TO THE VOLUNTARINESS OF HIS CONFESSION.

The district court refused to instruct the jury to consider the voluntariness of his statement to law enforcement officers. Prior to trial, Richard had moved to suppress the statement as involuntary, which motion the

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presentation of his case, if any, or during opening statements. Id. This rule allows the trial judge to determine whether the 404(b) factor sought to be proved by the evidence is indeed in dispute, and whether its probative value is substantially outweighed by its prejudicial effect. United States v. Figueroa, 618 F.2d 934 (2nd Cir. 1980).

Other circuits allow the introduction in the case-in-chief of prior crimes to prove intent when, unlike here, specific intent is an element of the crime charged. See, e.g., United States v. Hamilton, 684 F.2d 380 (6th Cir. 1982) (intent to defraud); United States v. Weidman, 572 F.2d 1199 (7th Cir. 1978) (mail fraud); United States v. Adcock, 558 F.2d 397 (8th Cir. 1977) (extortion).

court denied after an evidentiary hearing. During the trial, Richard introduced the note from the police which was used to induce him to come to speak with the investigators which resulted in the statement that was subsequently used against him. That note, which was left with Richard's wife, stated as follows: "It is very important that Richard Leander Smith contact me as soon as possible. He will be able to save himself some serious problems by talking with us...." (App. 129).

In affirming the trial court's refusal to instruct the jury under 18 U.S.C. §3501, the Fourth Circuit held that that section does not require that the jury be so instructed unless "the defendant has contested at trial, the voluntariness of the confession." (App. 1-10). The court did not explain what a

defendant must do in order to "contest" the issue of voluntariness. The Court of Appeals also noted that its previous decision in United States v. Inman, 352 F.2d 954 (4th Cir. 1965), which required the jury to find that a confession was voluntary before giving it any weight, was of questionable vitality in light of this Court's decision in Lego v. Twomey, 404 U.S. 477 (1972) and the enactment of 18 U.S.C. §3501, in 1968.

This court has not previously considered what action, if any, a defendant need take in order to become entitled to the jury instruction contemplated by 18 U.S.C. §3501. The statute itself contains no such requirement, but merely provides that, if the trial judge initially determines that the statement is admissible, the court "shall instruct the jury to give such

weight to the confession as the jury feels it deserves under all the circumstances." (Emphasis added).

The statute was enacted in response to this Court's opinion in Mallory v. United States, 454 U.S. 449 (1957), to broaden the scope of the inquiry as to voluntariness by removing delay alone as cause for suppression of a statement. United States v. Halbert, 436 F.2d 1226 (9th Cir. 1970). The statute specifically does not require either the defendant or the government to rely on each of the factors identified in the statute; rather, the statute clearly contemplates that the finder of fact may rely on any, or all, of the factors, as appropriate. Nothing in this Court's decision in Lego v. Twomey changes that fact, or requires any particular action by the defendant to put the issue of voluntariness before the

jury.

In this case, Richard introduced the note delivered by the police officer to him, indicating that, by meeting with them, he would "be able to save himself some serious problems...." (App. 129). That note was sufficient to raise an inference as to the voluntariness of the subsequent statement and to place the voluntariness of the statement at issue. Therefore, Richard had an absolute statutory right to have the jury instructed as to that issue. The Fourth Circuit clearly erred in holding that anything more than that was required.

CONCLUSION

For the foregoing reasons, the petitioners, James E. Smith and Richard L. Smith, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit, entered in the above-entitled proceedings on June 10, 1992.

Respectfully submitted,

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October 1992

92-631

No. _____

Supreme Court, U.S.
FILED
OCT 8 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term 1992

JAMES EDWARD SMITH, and
RICHARD LEANDER SMITH,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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October 8, 1992

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES EDWARD SMITH, a/k/a Smitty,
a/k/a Dumptruck Smitty,
Defendant-Appellant.

No. 91-5574

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD LEANDER SMITH, a/k/a Peter,
Defendant-Appellant.

No. 91-5575

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, District Judge.
(CR-90-71-R)

Argued: March 6, 1992

Decided: June 10, 1992

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and MURRAY, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Gerald Thomas Zerkin, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellants. Thomas Ernest Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Kelley H. Brandt, Robert Godfrey, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellants. Richard Cullen, United States Attorney, William G. Otis, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Following a jury trial in the United States District Court for the Eastern District of Virginia, James E. Smith ("James") and Richard L. Smith ("Richard") were convicted of interstate travel to promote drug trafficking, 18 U.S.C. § 1952(a); possession with intent to distribute heroin, 21 U.S.C. § 841(a)(1); and use of a telephone to facilitate drug trafficking, 21 U.S.C. § 843(b). James was also convicted of possession of a firearm by a convicted felon, 18 U.S.C. § 922(g); and distribution of heroin, 21 U.S.C. § 841(a)(1). Richard was convicted of participation in a drug trafficking conspiracy; 21 U.S.C. § 846, distribution of heroin, 21 U.S.C. § 841(a)(1); and distribution of cocaine, 21 U.S.C. § 841(a)(1).[1] Evidence at trial indicated that James, while incarcerated on a drug-related conviction in the District of Columbia, had planned and managed a drug distribution operation in Richmond,

---

[1]The jury acquitted James on one count of using a telephone to facilitate a drug transaction and acquitted Richard on one count of distribution of heroin. The district court dismissed a charge of participation in a drug trafficking conspiracy against James. The jury acquitted co-defendant Olivia Bratton of all charges.

Virginia. Richard participated in the buying and selling of drugs for the operation.

James and Richard appeal their convictions on a number of grounds. After a thorough review of the record, finding no reversible error, we affirm.

I.

On March 16, 1988, prior to any charges being filed in the present case, James pled guilty in the District of Columbia to a charge of distributing narcotics and was sentenced to a term of 35 years in prison. James argues that the presentation, in this case, of extensive evidence regarding the conduct that formed the basis of that prior conviction violated the Double Jeopardy clause of the Fifth Amendment. The evidence was admitted by the trial judge under Federal Rule of Evidence 404(b) as probative of James' "usual method of operation," his intent with respect to distribution, and his relationship with various witnesses who testified against him.

James' Double Jeopardy claim is based on the Supreme Court's decision in *Grady v. Corbin*, 495 U.S. 508, 109 L. Ed. 2d 548 (1990). In that case, the Court held that "the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.*, 109 L. Ed. 2d at 564. James argues that, in the present case, the Government used the conduct underlying his prior conviction as evidence to convict him of the present charges.

James overstates the holding in *Grady*. While the Government, in this case, uses prior offense conduct as *evidence* that James committed the present offense, the prior offense conduct is not an *element* of the present offense. As the above quoted language in *Grady* states, the Double Jeopardy clause is violated only when the Government uses a defendant's prior conduct "to establish an essential element of the offense charged." *Id.* The *Grady* Court cautioned, 'This is not . . . [a] 'same evidence' test." *Id.* This court has subsequently interpreted *Grady*, concluding that "*Grady* prohibits a successive prosecution only when the evidence of previously prosecuted conduct proves the

'entirety' of an essential element." *United States v. Clark*, 928 F.2d 639, 642 (4th Cir. 1991), *petition for cert. filed*, April 1, 1992. *Clark* noted that a broad interpretation of *Grady*, as urged by James, that would bar admission of previous offense conduct used merely as *evidence* of an element of the instant offense, would conflict with the holding of *Dowling v. United States*, 493 U.S. 342 (1990), a case which *Grady* did not purport to overrule. In *Dowling*, testimony under Rule 404(b) was deemed proper as tending to establish a defendant's identity, despite the fact that the testimony related to an incident for which the defendant had previously been tried and acquitted. As *Clark* points out, only the more restrictive reading of *Grady*, that previous offense conduct is barred by the Double Jeopardy Clause only when the conduct "proves the 'entirety' of an essential element" of the instant offense, is reconcilable with the *Dowling* decision. *See also United States v. Felix*, ___ U.S. ___, 1992 U.S. LEXIS 1954, *16-*17 (March 25, 1992) ("the introduction of relevant evidence of particular misconduct in a case is not the same as prosecution for that conduct" (footnote omitted)).

In addition, both James and Richard argue that the evidence of James' prior involvement with a major drug trafficking conspiracy was inadmissible under Rule 404(b). Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Fed. R. Evid. 404(b). James and Richard argue that evidence regarding the prior conspiracy *was* introduced to reflect upon their character, or alternatively, that if the evidence was admissible under Rule 404(b), that it was too prejudicial to be admitted under Rule 403.

However, the record reflects that evidence regarding the prior conspiracy was introduced for proper purposes under Rule 404(b). The Government contended that the evidence of the prior conspiracy was necessary to establish James' and Richard's intent to distribute and their motives in undertaking certain actions and dealing with certain

persons. Details of the operations also revealed similarities between the charged conduct and the previous operations—evidence of a common scheme or plan. The decision of the district court to admit Rule 404(b) evidence is discretionary and will not be disturbed unless it is arbitrary or irrational. *See, e.g., United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988). In the present case, the asserted grounds for the admission of the Rule 404(b) evidence were reasonable and the district court was within its discretion to admit the evidence. Moreover, the district court instructed the jury, "You have heard quite a bit of testimony of prior misconduct on their [the defendants'] part, but they are not on trial for that, and the only crimes that you are responsible for is what is contained in that indictment." J.A. at 235. As this court has previously held, "[t]he jury is generally presumed to be able to follow" a trial court's evidentiary instructions. *United States v. Jones*, 907 F.2d 456, 460 (4th Cir. 1990), *cert. denied*, 112 L. Ed. 2d 675 (1991). In this case, the trial court's instructions on the prior acts evidence properly confined the jury's focus to consideration of the evidence in light of the purposes for which the evidence had been introduced.

James argues that, at the very least, the district court should have severed his trial from that of the other defendants. He contends that the prior acts evidence was most relevant to the drug conspiracy charge. Because the drug conspiracy count had been dismissed with regard to James, and the evidence related primarily to James' prior activities, James argues that he was particularly prejudiced by admission of that evidence. He contends, therefore, that once the trial court made the decision to admit the prior acts evidence, fairness required that his trial be severed from that of the other defendants.

This argument fails because, as discussed above, James' prior acts were admissible against him under Rule 404(b). Generally, persons indicted together should be tried together, unless such trial would result in a miscarriage of justice. *United States v. Pryba*, 900 F.2d 748, 758 (4th Cir.), *cert. denied*, 112 L. Ed. 2d 258 (1990). Because the evidence of which James complains would be admissible against him even at a severed trial, James cannot begin to show that the joint trial constituted a miscarriage of justice.

II.

James argues that the trial court erred by not granting his motion to dismiss the charges or, in the alternative, to suppress evidence, on the grounds that evidence used against him was derived from testimony he had provided under a grant of immunity. First, James claims that the Virginia authorities had an obligation, under the terms of *Kastigar v. United States*, 406 U.S. 441 (1972), to prove that none of the evidence that was used against him was derived from the assistance he had earlier provided to the District of Columbia prosecutors. Under the terms of his plea agreement in the District of Columbia, signed February 8, 1988, James was granted transactional and use immunity for uncharged crimes. However, the terms of the agreement specifically provided:

> Nothing in this agreement shall be construed to protect Mr. Smith in any way from prosecution for: . . . any offenses committed by him after the date of this agreement. The information and documents that he discloses to the Government pursuant to this agreement may be used against him in any such prosecution.

J.A. at 70. The trial court found that (with the exception of the drug trafficking conspiracy count against James which was dismissed on Double Jeopardy grounds) the charges in the present case were all "new crimes" under the terms of the plea agreement. The record supports this finding. Thus, by the terms of the plea agreement, the Government was entitled to use any information provided by James in the prosecution of these crimes. The Government bore no burden to show that the D.C. prosecutors had not shared information with the Virginia authorities.

James also was granted use immunity by a letter from Assistant United States Attorney Liam O'Grady, dated April 21, 1988. That letter extended use immunity to James in exchange for his agreement to "cooperate fully" with investigators with respect to their ongoing investigation concerning drug trafficking in Virginia. However, the district court made an explicit factual finding that James breached this agreement. Contrary to James' assertion, this finding was not based on the district court's failure to distinguish between the meaning of

"active" and "full" cooperation, as commonly used in plea agreements.[2] Instead, even interpreting "full" cooperation as James urges, the district court's factual finding that "Smith had considerable knowledge about Richmond narcotics that he did not share with the authorities" is dispositive of whether James had complied with the plea agreement. *See United States v. Smith*, 759 F. Supp. 304, 309 (E.D. Va. 1991). Having breached the terms under which AUSA O'Grady offered him immunity, James cannot seek shelter under that agreement. Because James was not entitled to immunity, this court need not address the issue of whether the prosecution met its burden, under *Kastigar*, of proving that its evidence was not derivative of evidence obtained under a grant of use immunity.

III.

Richard makes several arguments regarding the admission of inculpatory statements that he made prior to his arrest. The facts regarding these statements are largely undisputed. Richmond Police Detective D.R. Carter went to Richard's home seeking to obtain his cooperation in the investigation of a related drug trafficking case. Richard was not home, so Detective Carter left a note on the front door asking Richard to contact Carter, stating that Richard "will be able to save himself some serious problems by talking with us." J.A. at 114. Several days later, Richard called Carter. Carter told Richard that he was under investigation, that the agents wanted his cooperation, and that he should hire a lawyer. Instead, Richard came to the FBI office and met with Carter and FBI agent Terry Carney. The officers informed Richard that he was not under arrest and that he could leave at any time. The officers also advised Richard of his *Miranda* rights. During the course of the ensuing conversation, Richard admitted that he had sold some cocaine and heroin during the summer of 1989.

First, Richard argues that Detective Carter's note should be interpreted as a binding agreement, and that a reasonable interpretation of

[2]James contends that in the specialized context of plea agreements "full" cooperation means merely the provision of information, in contrast to "active" cooperation which includes affirmative action to aid law enforcement authorities in the investigation and prosecution of criminal activity. We express no opinion on the validity of this distinction.

the note's assurance that Richard could "save himself some serious problems" was as a promise that Richard could avoid prosecution by talking with Detective Carter. This position has no merit. No reasonable person could interpret Carter's note as a plea agreement binding upon the Government. The case Richard relies upon, *Cooper v. United States*, 594 F.2d 12 (4th Cir. 1979), to the questionable extent that portions of the opinion may have survived the Supreme Court's conflicting decision in *Mabry v. Johnson*, 467 U.S. 504 (1984), pertained to an agreement proffered by the Government that was "specific, unambiguous and not unreasonable on its face." 594 F.2d at 19. Obviously, Detective Carter's note does not meet these criteria. *Cf. Plaster v. United States*, 789 F.2d 289, 292-93 (4th Cir. 1986) (dicta indicating *Cooper* was overruled by *Mabry*).

Alternatively, Richard argues that the note was coercive, tainting his subsequent inculpatory statements and rendering them inadmissible under the Fifth Amendment. However, even if the note could be read as implicitly threatening, the taint of the note clearly does not continue past Richard's voluntary appearance at the FBI office, the assurance that he was free to leave, and the agents' advice that Richard obtain an attorney prior to making a statement. *See, e.g., United States v. Pelton*, 835 F.2d 1067, 1071 (4th Cir. 1987) ("voluntariness of a statement is to be determined from the 'totality of the circumstances'"), *cert. denied*, 486 U.S. 1010 (1988); *United States v. Fazio*, 914 F.2d 950, 956 (7th Cir. 1990) (suspect's voluntary appearance at police station is evidence of voluntariness of his statement).

Richard further argues that the Government did not prove, by the requisite level of proof, that he voluntarily waived his *Miranda* rights. However, *Miranda* protections apply only to custodial interrogation. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420 (1984). As discussed above, Richard was under no coercion to provide a statement, and was free to terminate the interview and leave the presence of the officers at any time. As a result, the police were under no obligation to even provide Richard with the *Miranda* warnings, and the Government bears no burden to show a voluntary waiver of these protections.

Finally, Richard argues that, having made the decision to admit his inculpatory statements, the trial judge was under the obligation to instruct the jury that they could only consider the statements if they

found them to be voluntary. *See United States v. Inman*, 352 F.2d 954 (4th Cir. 1965). The continuing vitality of the *Inman* ruling has been called into question by the Supreme Court's subsequent decision in *Lego v. Twomey*, 404 U.S. 477, 489-90 (1972) (suggesting that defendant is not entitled to have jury decide voluntariness issue anew after preliminary judicial determination, but basing the decision, in part, on the fact that the issue was not raised below). *See United States v. Buie*, 538 F.2d 545, 547 (4th Cir. 1976) (declining to decide whether *Lego* overruled *Inman* on this issue).

Since *Inman*, Congress has enacted a legislative framework for the admission of confessions, requiring 1) an initial judicial determination of voluntariness, 2) admission, before the jury, of all relevant evidence on the issue of voluntariness, and 3) an instruction to the jury to accord the confession "such weight . . . as the jury feels it deserves under all the circumstances." 18 U.S.C. § 3501. In light of the subsequent judicial and legislative developments in this area of the law, *Inman* is of dubious validity at best. Regardless of its status, however, there is no question that the jury instructions mandated by both *Inman* and section 3501 are applicable only if the defendant has contested, at trial, the voluntariness of his confession. *See, e.g., United States v. Sebetich*, 776 F.2d 412, 422 n.16 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988). In this case, there is nothing in the record to indicate that Richard made the voluntariness of his confession an issue at trial. As a result, it was not error for the trial court to have declined to instruct the jury on this matter.

IV.

Finally, James and Richard contend that the outcome of their case was biased by the district court's jury instructions. In particular, the defendants dispute the district court's instructions relating to the Government witnesses testifying pursuant to plea agreements. The trial judge instructed the jury, "[I]t doesn't make any difference how hard the defendant pleads for reduction of sentence and how much the government says he is cooperating, and how highly they think of the witness' testimony, it is the judge's sole responsibility to determine whether there will be a reduction of sentence." J.A. at 239. James and Richard had sought to discredit damaging testimony by arguing that the Government witnesses had self-interested motives to exaggerate

their testimony to gain the Government's favor. They argue that the above instruction misled the jury about the strength of that motivation by downplaying the Government's potential to affect the trial court's sentencing decision.

This argument has no merit. First, the district court's instruction was an accurate representation of the law. Second, the district court had previously instructed the jury on witness credibility in general, indicating that the testimony of former accomplices who entered plea agreements with the Government should be considered with "caution." J.A. at 237. Read as a whole, the court's jury instructions properly conveyed to the jury the appropriate concerns to consider in evaluating the credibility of the Government witnesses. *See United States v. Curry*, 512 F.2d 1299 (4th Cir.) (not "plain error" for trial court to refuse to give specific credibility instruction pertaining to witnesses testifying pursuant to grant of immunity where court instructed on witness credibility in general), *cert. denied*, 423 U.S. 832 (1975).

V.

We find no error in the proceedings before the district court. For the foregoing reasons, the convictions of James and Richard are hereby

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE EASTERN District of VIRGINIA/Richmond Division

UNITED STATES OF AMERICA, **JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On Or After November 1, 1987)
v.

JAMES EDWARD SMITH

Case Number: Criminal No. 90-00071-01-R

THE DEFENDANT:

___ pleaded guilty to count(s) _____
____ was found guilty on count(s) 2,3,4,7 and 9 of the indictment after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense
18:922(g)	Possession of firearm by convicted felon
18:1952(a)(3) & 2	Interstate Travel in Aid of Racketeering; aid & abet
21:841(a)(1) & 18:2	Possession with Intent to distribute one or more kilograms of heroin; aid & abet
21:843(b)	Use of Telephone in Narcotics Trafficking
21:841(a)(1) & 18:2	Distribution of 100 or more Grams of Heroin; aid & abet

Date Offense Concluded	Count Numbers
3/9/88	2

3/9/88	3
3/9/88	4
4/28/89	7
5/1/89	9

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

x The defendant has been found not guilty on count 8, and is discharged as to such count.
x Count 5 is dismissed on the motion of the United States.
x It is ordered that the defendant shall pay a special assessment of $250.00, for count(s) 2,3,4,7 and 9.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgement are fully paid.

Defendant's Social Sec. No.: 227-36-2345
Defendant's Date of Birth: 1-9-35
Defendant's Mailing Address:
410 Bentwood Drive
Ft. Washington, MD 20744

Defendant's Residence Address:
Same as Above

May 16, 1991
Date of Imposition of sentence

_____
Signature of Judicial Officer

Richard L. Williams

United States District Judge
Name & Title of Judicial Officer

May 16, 1991
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months on Count; 60 months on Count 3; 400 months on Count 4; 84 months on Count 7; and, 120 months on Count 9. The terms of imprisonment of Counts 2,3,7 and 9 are to run consecutively to each other and concurrently to the term of imprisonment on Count 4.

This sentence is to run consecutively to any other sentence the defendant is presently serving.

x The Court makes the following recommendations to the Bureau of Prisons: **that the defendant be incarcerated in an institution where the defendant may receive medical treatment and where the safety of the defendant may be maintained with respect to witnesses in this case and any known enemies of the defendant.**

x The defendant is remanded to the custody of the United States marshal.

_ The defendant shall surrender to the United States marshal for this district,

_ at _____ a.m., p.m. on _____.

_ as notified by the United States marshal

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

_ before 2 p.m. on _____

_ as notified by the United States marshal

_ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on ____ to _____ at ____, with certified copy of this judgment.

_____
United States Marshall
By_____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term on 3 years on Count 2; 3 years on Count 3; ten(10) years on Count 4; 3 years on Count 7; and, 8 years on Count 9. All terms of supervised release are to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this Court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

_ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

_ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

_ The defendant shall not possess a firearm or destructive device.

SUPREME COURT OF THE UNITED STATES

No. A-155

James Edward Smith,

Petitioner

v.

United States

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 8, 1992, 1992.

/s/ William H. Rehnquist
Chief Justice of the
United States

Dated this 25th
day of August, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	
v.	**CRIMINAL NO.**
JAMES EDWARD SMITH a.k.a. "Smitty" a.k.a. "Dumptruck Smitty" (Counts 1 though 5, 7, 8 and 9)	21 U.S.C. § 846 Conspiracy to Distribute One or More Kilograms of Heroin (Count 1)
OLIVIA BRATTON a.k.a. "Peaches" (Counts 1 and 9)	18 U.S.C. § 922(g) Felon in Possession of a firearm (Count 2)
RICHARD LEANDER SMITH a.k.a. "Peter" (Counts 1, 3, 4, 6, 10, 11 and 12)	18 U.S.C. § 1952(a)(3) Interstate Travel in Aid of Racketeering (Count 3)
	21 U.S.C. § 841(a)(1) Possession with Intent to Distribute one or more kilograms of Heroin (Count 4)
	21 U.S.C. § 843(b) Use of Telephone in

) Narcotics Tra-
) fficking
) (Counts 5,7,8
) and 10)
)
) 21 U.S.C.
) § 841(a)(1)
) Distribution of
) Heroin (Counts
) 6 and 11)
)
) 21 U.S.C.
) § 841(a)(1)
) Distribution of
) 100 or more
) Grams of Heroin
) (Count 9)
)
) 21 U.S.C.
) § 841(a)(1)
) Distribution of
) Cocaine
) (Count 12)

AUGUST 1990 TERM - At Richmond

COUNT ONE

THE GRAND JURY CHARGES THAT from on or about February 9, 1988, the exact date being unknown to the Grand Jury, and continuously thereafter up to and including the filing of this indictment, in the Eastern District of Virginia, and elsewhere, JAMES EDWARD SMITH, a.k.a. "Smitty," a.k.a. "Dumptruck Smitty," OLIVIA BRATTON, a.k.a. "Peaches," and RICHARD LEANDER SMITH, a.k.a. "Peter," the defendants herein, did unlawfully, knowingly and intentionally combine, conspire, confederate and agree with each other, and with other persons, both known and unknown to the Grand Jury, to commit the following offenses against the United States of America:

1. To knowingly, intentionally and unlawfully possess with intent to

distribute one (1) kilogram or more of a mixture and substance containing a detectable amount of heroin, a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. To knowingly, intentionally and unlawfully distribute one (1) kilogram or more of a mixture and substance containing a detectable amount of heroin, a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

3. To knowingly, intentionally and unlawfully distribute one hundred (100) grams or more of a mixture and substance containing a detectable amount of heroin, a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

4. To knowingly, intentionally and unlawfully travel in interstate commerce

and cause others to travel in interstate commerce with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3) and 2.

A. WAYS, MANNER AND MEANS OF THE CONSPIRACY

The ways, manner and means by which the conspirators carried out the purpose of the conspiracy includes, but is not limited to, the following:

1. It was part of the conspiracy that the defendants and co-conspirators would transport supplies of heroin, and other controlled substances, various drug paraphernalia, substantial sums of money, and firearms, from the District of Columbia and other jurisdictions outside of the Eastern District of Virginia, to

the Eastern District of Virginia.

2. It was further part of the conspiracy that the defendants and co-conspirators secreted supplies of heroin, other controlled substances, various drug paraphernalia, substantial sums of money, and weapons, in storage lockers in and around Richmond, Virginia, in the Eastern District of Virginia.

3. It was further part of the conspiracy that the defendants and co-conspirators would and did "cut" the heroin and other controlled substances, that is, add a non-controlled substance to the heroin or other controlled narcotic substances, in order to maximize the total amount of controlled substances for sale and to maximize their profits.

4. It was further part of the conspiracy that additional supplies of heroin would be transported to the Eastern District of Virginia and mixed with

supplies of heroin already stored, held and secreted in the Eastern District of Virginia in order to increase the purity of the heroin and its acceptability among the heroin customers.

5. It was further part if the conspiracy that the defendants and co-conspirators sold heroin and other narcotic controlled substances in and around Richmond, Virginia, in the Eastern District of Virginia.

6. It was further part of the conspiracy that defendants and co-conspirators would and did derive substantial sums of money from the knowing, intentional, unlawful and illegal sales of heroin and other controlled narcotic substances, in and around Richmond, Virginia, in the Eastern District of Virginia.

7. It was further part of the conspiracy that the defendants and co-

conspirators would meet periodically in Alexandria, Virginia and, subsequently in Petersburg, Virginia, in the Eastern District of Virginia, and elsewhere, to receive instructions on how the money and the heroin were to be directed, moved, and to decide to whom it was to be given.

8. It was further part of the conspiracy that the defendants and co-conspirators would talk by telephone, to receive instructions and to coordinate the movement, direction, and recipients of the heroin and money.

9. It was further part of the conspiracy that the heroin and substantial sums of money were distributed to persons known and unknown to the Grand Jury at the direction of a co-conspirator.

B. OVERT ACTS

In furtherance of this conspiracy and to bring about the objects and goals of the conspiracy, the defendants, co-

conspirators, and unindicted co-conspirators committed overt acts in the Eastern District of Virginia and elsewhere, including, but not limited to, the following:

1. On or about Feb 9, 1988, the exact date being unknown to the Grand Jury, defendant JAMES EDWARD SMITH, a.k.a. "Smitty" and James Reginald Smith, a.k.a. "Scank," an unindicted co-conspirator, met in Alexandria, Virginia, in the Eastern District of Virginia, to discuss the transportation of heroin, other controlled substances, drug paraphernalia and other items located in the District of Columbia and the District of Maryland to the Eastern District of Virginia.

2. On or about February 15, 1988, the exact date being unknown to the Grand Jury, unindicted co-conspirator James Reginald Smith, a.k.a. "Scank," at the direction of defendant, JAMES EDWARD

SMITH, a.k.a. "Smitty," went to a residence in Glen Allen, Virginia, in the Eastern District of Virginia, where he picked up the keys to various apartments in the District of Columbia and the District of Maryland.

3. On or about February 15, 1988, the exact date being unknown to the Grand Jury, defendant, OLIVIA BRATTON, a.k.a. "Peaches," telephoned Excel Alexander, a.k.a. "Buddy," an unindicted co-conspirator, and told him that he was to direct unindicted co-conspirator James Reginald Smith, a.k.a. "Scank," and other co-conspirators to certain apartments in the District of Columbia and the District of Maryland, and gave him the locations of those apartments.

4. On or about March 9, 1988, the exact date being unknown to the Grand Jury, defendant RICHARD LEANDER SMITH, a.k.a. "Peter," and unindicted co-

conspirator James Reginald Smith, a.k.a. "Scank," and other unindicted co-conspirators, who are unknown to the Grand Jury, drove from Richmond, Virginia, in the Eastern District of Virginia, to the District of Columbia where they met an unindicted co-conspirator Excel Alexander, a.k.a. "Buddy."

5. On or about March 9, 1988, the exact date being unknown to the Grand Jury, defendant RICHARD LEANDER SMITH, a.k.a. "Peter," unindicted co-conspirators James Reginald Smith, a.k.a. "Scank," and Excel Alexander, a.k.a. "Buddy," and other unindicted co-conspirators, who are unknown to the Grand Jury, went to various residences, premises and locations in the District of Columbia and the District of Maryland, which were under the control of defendant JAMES EDWARD SMITH, a.k.a. "Smitty," and removed, inter alia, quantities of heroin, drug paraphernalia,

other controlled substances, drug proceeds i.e., money, and firearms from those residences, premises, and locations.

6. On or about March 9, 1988, the exact date being unknown to the Grand Jury, defendant RICHARD LEANDER SMITH, a.k.a. "Peter," unindicted co-conspirators, who are unknown to the Grand Jury, transported a quantity of heroin, other controlled substances, drug proceeds, i.e., money, drug paraphernalia and firearms from the District of Columbia to the Eastern District of Virginia, to be stored for later distribution and sale.

7. From on or about March 15, 1988, the exact date being unknown to the Grand Jury, and on multiple occasions thereafter, in Richmond, Virginia, in the Eastern District of Virginia, unindicted co-conspirator James Reginald Smith, a.k.a. "Scank" distributed amounts of heroin in excess of personal use amount to

defendant RICHARD LEANDER SMITH, a.k.a. "Peter," for sale and redistribution.

8. In or about January, 1989, the exact date being unknown to the Grand Jury, unindicted co-conspirator James Reginald Smith, a.k.a. "Scank" met with defendants JAMES EDWARD SMITH, a.k.a. "Smitty" and OLIVIA BRATTON, a.k.a. "Peaches," in Petersburg, Virginia, in the Eastern District of Virginia, and informed them that the heroin that had been provided was of a poor quality.

9. On or about February 1, 1989, the exact date being unknown to the Grand Jury, unindicted co-conspirators James Reginald Smith, a.k.a. "Scank," and Charles Henry Smith, a.k.a. "Dickie," at the direction of defendant, JAMES EDWARD SMITH, a.k.a. "Smitty," carried approximately $35,000 in drug proceeds belonging to defendant, JAMES EDWARD SMITH, a.k.a. "Smitty," to an individual

in the District of Columbia, who is known to the Grand Jury.

10. On or about March 3, 1989, defendant JAMES EDWARD SMITH, a.k.a. "Smitty," in Petersburg, Virginia, in the Eastern District of Virginia, telephoned unindicted co-conspirator Charles Henry Smith, a.k.a. "Dickie," in Richmond, Virginia, and was informed that defendant RICHARD LEANDER SMITH, a.k.a. "Peter," had not meet with unindicted co-conspirator, James Reginald Smith, a.k.a. "Scank," and defendant JAMES EDWARD SMITH, a.k.a. "Smitty," told unindicted co-conspirator Charles Henry Smith, a.k.a. "Dickie," to keep defendant RICHARD LEANDER SMITH, a.k.a. "Peter," out of the conspiracy to distribute heroin.

11. On or about April 14, 1989, defendant JAMES EDWARD SMITH, a.k.a. "Smitty," in Petersburg, Virginia, in the Eastern District of Virginia, telephoned

unindicted co-conspirator Charles Henry Smith, a.k.a. "Dickie," in Richmond, Virginia, and informed him that he had arranged for unindicted co-conspirator James Reginald Smith, a.k.a. "Scank" to provide heroin to him, after being cut off from the heroin supply that unindicted co-conspirator James Reginald Smith, a.k.a. "Scank" had.

12. On or about April 25, 1989, the date being unknown to the grand Jury, defendant RICHARD LEANDER SMITH, a.k.a. "Peter," sold one "spoon" (approximately 1.8 grams) of heroin to unindicted co-conspirator Evans Lee Gordon, in Richmond, Virginia.

13. On or about April 28, 1989, at 7:03 a.m., defendant JAMES EDWARD SMITH, a.k.a. "Smitty," in Petersburg, Virginia, in the Eastern District of Virginia, telephoned unindicted co-conspirator Charles Henry Smith, a.k.a. "Dickie" and

ordered him to provide a quantity of heroin to an unindicted co-conspirator who is unknown to the Grand Jury.

14. On or about April 28, 1989, defendant JAMES EDWARD SMITH, a.k.a. "Smitty," telephoned unindicted co-conspirator James Reginald Smith, a.k.a. "Scank," to ask if defendant OLIVIA BRATTON, a.k.a. "Peaches" was going to deliver a quantity of heroin May 1, 1989, and unindicted co-conspirator James Reginald Smith, a.k.a. "Scank," responded he would make sure that she did.

15. On or about May 1, 1989, the exact date being unknown to the Grand Jury, unindicted co-conspirator James Reginald Smith, a.k.a. "Scank," was provided in excess of one hundred grams of heroin by defendant OLIVIA BRATTON, a.k.a. "Peaches," in Richmond, Virginia in the Eastern District of Virginia.

16. On or about May 14, 1989, the

exact date being unknown to the Grand Jury, unindicted co-conspirator James Reginald Smith, a.k.a. "Scank," gave approximately $25,000 in U.S. currency to defendant OLIVIA BRATTON, a.k.a. "Peaches," in payment for heroin previously provided on or about May 1, 1989, the exact date being unknown to the Grand Jury.

17. On or about June 1, 1989, the exact date being unknown to the Grand Jury, unindicted co-conspirator James Reginald Smith, a.k.a. "Scank" provided defendant OLIVIA BRATTON, a.k.a. "Peaches," with $25,000 in payment for heroin previously provided on or about May 1, 1989, the exact date being unknown to the Grand Jury.

18. On or about October 20, 1989, in Hanover County, Virginia, in the Eastern District of Virginia, defendant JAMES EDWARD SMITH, a.k.a. "Smitty," possessed

with the intent to distribute in excess of one kilogram of heroin.

19. On or about October 20, 1989, in Hanover County, Virginia, in the Eastern District of Virginia, defendant JAMES EDWARD SMITH, a.k.a. "Smitty," was in possession of a firearm.

(In violation of Title 21, United States Code, Section 846.)

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT on or about March 9, 1988, the exact date being unknown to the Grand Jury, in Richmond, Virginia, in the Eastern District of Virginia, and within the jurisdiction of this Court, defendant JAMES EDWARD SMITH, a.k.a. "Smitty," having previously been convicted on December 3, 1973, in the United States District Court for the Eastern District of Virginia, Richmond Division, of a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess and receive a firearm, to wit: a .44 caliber Magnum Ruger, Serial Number 80-13044; a .44 caliber Magnum Ruger, Serial Number 82-57673; a .38 caliber Smith and Wesson revolver, Model 19-3, Serial Number 13-D 2862; a 30/30 Winchester Model 94, Serial Number 50 89155; and a Colt 45, semiautomatic

pistol, Serial Number 70G72648, which had been shipped and transported in interstate and foreign commerce.

(In violation of Title 18, United States Code, Section 922(g).)

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT on or about March 9, 1988, the exact date being unknown to the Grand Jury, defendant, JAMES EDWARD SMITH, a.k.a. "Smitty," did unlawfully, knowingly, and willfully cause another to travel, and defendant, RICHARD LEANDER SMITH, a.k.a. "Peter," did unlawfully, knowingly and willfully travel in interstate commerce from Richmond, Virginia, in the Eastern District of Virginia, and within the jurisdiction of this Court, to the District of Columbia, and return to Richmond, Virginia, within the Eastern District of Virginia, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on, of an unlawful activity, to wit: a business enterprise involving the distribution of and possession of, with intent to

distribute, heroin, a Schedule I narcotic controlled substance, and thereafter the said defendants did perform, attempt to perform and cause to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on, of the aforesaid unlawful activity.

(In violation of Title 18, United States Code, Sections 1952(a)(3) and 2.)

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT on or about March 9, 1988, the exact date being unknown to the Grand Jury, in Richmond, Virginia, in the Eastern District of Virginia, and within the jurisdiction of this Court, defendant JAMES EDWARD SMITH, a.k.a. "Smitty," and defendant RICHARD LEANDER SMITH, a.k.a. "Peter," did knowingly, intentionally and unlawfully possess with intent to distribute one (1) kilogram or more of heroin, a Schedule I narcotic controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT on or about April 14, 1989, in Petersburg, Virginia, in the Eastern District of Virginia, and within the jurisdiction of

this Court, and elsewhere, the defendant, JAMES EDWARD SMITH, a.k.a. "Smitty," did unlawfully, knowingly and intentionally use a communication facility, that is, a telephone, in facilitating the unlawful, knowing and intentional distribution of and possession with intent to distribute heroin, a Schedule I narcotic controlled substance.

(In violation of Title 21, United States Code, Section 843(b).)

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT on or about April 25, 1989, the exact date being unknown to the Grand Jury, in Richmond, Virginia, in the Eastern District of Virginia, and within the jurisdiction of this Court, defendant RICHARD LEANDER SMITH, a.k.a. "Peter," did knowingly, intentionally and unlawfully distribute heroin, a Schedule I narcotic controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1).)

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT on or about April 28, 1989, in Petersburg, Virginia, in the Eastern District of Virginia, and within the jurisdiction of this Court, and elsewhere, the defendant, JAMES EDWARD SMITH, a.k.a. "Smitty," did unlawfully, knowingly and intentionally use a communication facility, that is, a

telephone, in facilitating the unlawful, knowing and intentional distribution of and possession with intent to distribute heroin, a Schedule I narcotic controlled substance.

(In violation of Title 21, United States Code, Section 843(b).)

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT on or about April 28, 1989, in Petersburg, Virginia, in the Eastern District of Virginia, and within the jurisdiction of this Court, and elsewhere, the defendant, JAMES EDWARD SMITH, a.k.a. "Smitty," did unlawfully, knowingly and intentionally use a communication facility, that is, a telephone, in facilitating the unlawful, knowing and intentional distribution of and possession with intent to distribute heroin, a Schedule I narcotic controlled substance.

(In violation of Title 21, United States Code, Section 843(b).)

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT on or about May 1, 1989, the exact date being unknown to the Grand Jury, in Richmond, Virginia, in the Eastern District of Virginia, and within the

jurisdiction of this Court, the defendants, OLIVIA BRATTON, a.k.a. "Peaches" and JAMES EDWARD SMITH, a.k.a. "Smitty," did knowingly, intentionally and unlawfully distribute one hundred (100) grams or more of heroin, a Schedule I narcotic controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.)

COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT on or about June 18, 1989, in Richmond, Virginia, in the Eastern District of Virginia, and within the jurisdiction of this Court, the defendant, RICHARD LEANDER SMITH, a.k.a. "Peter," did unlawfully, knowingly and intentionally use a communication facility, that is, a telephone, in facilitating the unlawful, knowing and intentional distribution of and possession with intent to distribute cocaine, a Schedule II narcotic controlled substance.

(In violation of Title 21, United States Code, Section 843(b).)

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES THAT in or about the summer of 1989, the exact date being unknown to the Grand Jury, in Richmond, Virginia, in the Eastern District of Virginia, and within the

jurisdiction of this Court, defendant RICHARD LEANDER SMITH, a.k.a. "Peter," did knowingly, intentionally and unlawfully distribute heroin, a Schedule I narcotic controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1).)

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES THAT in or about the summer of 1989, the exact date being unknown to the Grand Jury, in Richmond, Virginia, in the Eastern District of Virginia, and within the jurisdiction of this Court, defendant RICHARD LEANDER SMITH, a.k.a. "Peter," did knowingly, intentionally and unlawfully distribute cocaine, a Schedule II narcotic controlled substance.

(In violation of Title 21, United States Code, Section 841(a)(1).)

A TRUE BILL

_____
FOREMAN

HENRY E. HUDSON
UNITED STATES ATTORNEY

/S/ ROSCOE C. HOWARD, JR.
Roscoe C. Howard, Jr.
Assistant United States Attorney

No. _____

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

==========

THE UNITED STATES OF AMERICA

vs.

JAMES EDWARD SMITH, aka "Smitty"
"Dumptruck Smitty"
OLIVIA BRATTON, aka "Peaches"
RICHARD LEANDER SMITH, aka "Peter"

==========

INDICTMENT

In violation of 21 U.S.C. § 846, Conspiracy to Distribute Heroin.
In violation of 18 U.S.C. § 922(g), Felon in Possession of a Firearm.
In violation of 18 U.S.C. § 1952(a)(3), Interstate Travel in Aid of Racketeering.
In violation of 21 U.S.C. § 841(a)(1), Possession with Intent to Distribute Heroin.
In violation of 21 U.S.C. § 843(b), Use of Telephone in Narcotics Trafficking.
In violation of 21 U.S.C. § 841 (a)(1), Distribution of Heroin and Cocaine.

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A true bill.

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Foreman

==========

Filed in open court this _____ day,

of _____A.D. 19_____

_____

Clerk

==========

Bail, $_____

_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA,	)	Filed Feb. 20, 1991
v.	)	CRIM. NO. 90-00071-R
JAMES EDWARD SMITH,	)	
Defendant.	)	UNDER SEAL

ORDER

This matter is before the Court on Defendant James Edward Smith's motions to dismiss Count I of the Indictment, and for a further hearing under Kastigar. For the reasons stated in the accompanying Memorandum Opinion, the Court DISMISSES Defendant James Edward Smith from Count I of the Indictment in this matter, and DENIES the Defendant's motion for additional hearings under Kastigar.

It is so ORDERED.

Let the Clerk send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

_____ _____

DATE U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	Filed May 23, 1991
v.	)	CRIMINAL NO. 90-71R
JAMES E. SMITH	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given pursuant Rules 3 and 4 of the Federal Rules of Appellate Procedure that the defendant, James E. Smith, by counsel, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the judgement of conviction entered by this Court in this action on May 16, 1991.

Respectfully submitted,

JAMES E. SMITH
By Counsel

COHEN, GETTINGS, ALPER & DUNHAM
2200 Wilson Boulevard, 8th Floor
Arlington, Virginia 22201
(703) 525-2260

By: _____
Brian P. Gettings
Frank W. Dunham, Jr.
Stewart T. Leeth

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of Appeal, was mailed, postage prepaid, to Roscoe Howard, Esquire, Assistant United States Attorney, 1100 East Main Street, Richmond, Virginia 23219, this 22nd day of May, 1991.

_____

BY MR. HOWARD:

Q. Ms. Caviness, I would like to ask you if you remember entering a plea agreement in the District of Columbia on October 30, 1987, pleading to one count of distribution of a controlled substance, heroin?

A. Yes.

Q. I would like to show you Government's Exhibit Number 59. Is that your plea agreement?

A. Yes.

Q. Ms. Caviness, after entering the plea agreement, you entered into the witness protection plan; is that correct?

A. Yes.

Q. And you are presently in that program; is that correct?

A. Yes, I am.

Q. Ms. Caviness, I would like to ask you -- your plea agreement included a charge of distribution of heroin. Can you

tell the members of the jury when you started distributing heroin?

A. I think it was in the summer of 1984.

Q. And can you tell the members of the jury how you got started distributing heroin?

A. I was having money problems, and that was the only thing I could do.

Q. Who did you go to in order to get yourself started, ma'am?

A. Pardon me?

Q. Who did you go to?

A. I went to a friend, Smitty.

Q. And do you know Smitty's real name?

A. James Smith.

Q. I would like to ask you if he is present today.

A. Yes.

Q. Would you please point him out?

A. He is right there on the end.

MR. HOWARD: Your Honor, if the record would reflect an identification of James Edward Smith.

THE COURT: It will so reflect.

BY MR. HOWARD:

Q. How were you introduced to Smitty, ma'am?

A. I had known Smitty for a few years through a former boy friend of mine.

Q. Who is your ---

A. William Sweeney.

Q. How did Mr. Sweeney know Mr. Smith?

A. He was friends to him.

Q. How did you approach Mr. Smith about your getting involved?

A. Pardon me?

Q. How did you approach Mr. Smith? How did your relationship get started?

A. Well, to tell you the truth, I was having money problems, and I

approached him about doing some work.

Q. When you approached him about doing some work, what did that mean?

A. Selling drugs.

Q. And did you start selling drugs?

A. Not right away.

Q. What did you start doing?

A. It was about two or three weeks after I had approached him.

Q. What happened after you approached him initially?

A. I called him back and he came by.

Q. When he came by, what did he do when he came by?

A. Ten quarters Ten or 20 quarters. I forget. It has been awhile.

Q. Quarters are a quantity of heroin; is that correct?

A. Yes.

Q. Do you know how much is in a quarter?

A. Approximately a quarter of a teaspoon, or a little less.

Q. How much were you selling those for?

A. I was selling them for $20.

Q. How often were you going to Mr. Smith in order to get these quarters?

A. In the beginning, about once a week.

Q. And how long were you going to him for about once a week?

A. Maybe a month or two. I'm not sure.

Q. At this point, did you increase the quantity that you were getting from him?

A. Yes, I did.

Q. And what did you -- that was after the first month you increased the quantity?

A. Yes.

Q. Then what did you increase it

to?

A. To 50.

Q. To 50 quarters?

A. Yes.

Q. How often were you getting 50 quarters?

A. About once a week, sometimes twice a week.

Q. And for how long did that go on?

A. About three or four months, approximately.

Q. After three or four months, would that take you into the year 1985?

A. Yes.

Q. What happened in 1985?

A. In 1985, I became pregnant and I had a baby. I had to stop for awhile because got sick and I thought I gave birth to my son.

Q. Eventually, did you get well?

A. Yes. That was about six or seven weeks.

Q. Did you go back to selling drugs?

A. Yes, I did.

Q. And do you remember when that was, approximately?

A. I would say the last part of August or the first part of September.

Q. Did you return to Mr. Smith in order to sell drugs?

A. Yes.

Q. Can you tell the members of the jury how you contacted Mr. Smith?

A. Well, I would call.

Q. And in this case when you called, did he indicate a willingness to let you start selling again?

A. Could you explain yourself?

Q. Did he start giving you drugs again?

A. Yes.

Q. And that was approximately the fall of 1985?

A. Yes.

Q. And how much were you selling at that point?

A. About the same, 50 to 100 a week.

Q. And you were going to him once a week; is that correct?

A. Sometimes every two weeks, because, you know, depending on how fast I could get rid of them.

Q. How long did that go on?

A. I think October, 1987.

Q. October, 1987?

A. When I got arrested, yes.

Q. After you got arrested, did you agree to work with the government?

A. Yes.

Q. And did you start working with an undercover officer by the name of Veronica Baker?

A. Yes.

Q. Do you remember introducing

Veronica Baker to Mr. Smith?

A. Yes.

Q. During that time that you were working with Mr. Smith, did you learn who else was in his organization? Who else distributed drugs for him?

A. No, I didn't.

Q. Do you know where he distributed drugs?

A. No.

Q. Did you ever have occasion where you had a problem contacting Mr. Smith?

A. Yes, I did, sometimes.

Q. When you had problems contacting Mr. Smith, how would you get in touch with him?

A. I would just call, and if he wasn't in, I would leave him a message for him to call me.

Q. Where would you leave a message?

A. I would call his stepdaughter, I think, or godchild.

Q. Do you know her name?

A. One of them is Peaches.

Q. Do you know who Peaches is?

A. I have never really met Peaches.

Q. And when you called Peaches, what would you say?

A. Sometimes I would tell her, "Tell your father that I called," and if he didn't call right away, I would call her back and I would tell her to tell him that I need to go to the grocery store.

Q. Would you tell her anything else?

A. Sometimes I would tell him that I needed to get some shoes or something like that.

Q. What did that mean?

A. That I needed some work.

Q. When you say, "Work," what are you speaking of?

A. Heroin.

Q. Did you ever use those two

phrases, "I need to go to the grocery store," or did you say --

A. "The baby needs shoes."

Q. Did you ever use that with anybody else?

A. No.

Q. Did you ever use it with Mr. Smith?

A. Occasionally.

Q. How did you come to learn that that phraseology meant that you needed heroin?

A. I learned it from a friend of mine.

Q. Who is your friend?

A. William Sweeney.

Q. How did you learn to contact Peaches?

A. A niece of mine gave me her number.

Q. How did you know misses -- how did you know the woman you know as

Peaches?

A. Her and Mr. Smith --

MR. DOHNAL: Your Honor, I would object to this line of examination. This is hearsay.

THE COURT: The objection is overruled. Proceed.

BY MR. HOWARD:

Q. How did she know Peaches?

A. She was dating Mr. Smith.

Q. Did you ever call Peaches anywhere other than the limousine service?

A. At her house.

Q. And after you called her, did she indicate or seem to know what to do?

A. I would give her the message, and I would say, "Tell your father get in touch with me," and tell her anything else. If he called, she would tell him that.

Q. After you gave that message to Peaches, did Mr. Smith get in touch with

you?

A. Sometimes. Sometimes he wouldn't.

Q. In talking with Peaches or Mr. Smith, did you ever actually use the term "heroin"?

A. No.

Q. Do you know why that was?

A. Nobody never came around to use it.

MR. HOWARD: Your Honor, I don't have any further questions.

THE COURT: Any cross-examination, Mr. Dunham or Mr. Gettings?

MR. GETTINGS: Your Honor, could we defer to Mr. Dohnal on this?

THE COURT: Yes. Mr. Dohnal?

MR. DOHNAL: Thank you, your Honor.

CROSS EXAMINATION

BY MR. DOHNAL:

Q. Ms. Caviness, when you would

call and leave a message with Peaches, as you knew her, you would, as you have indicated, speak in code, you needed baby shoes, or you needed to go to the grocery store?

A. And sometimes I would tell her to tell your father to call me.

Q. But it was never anything more than that. You never discussed with her anything involving the drug trade or any specifics whatsoever?

A. No.

Q. And that was because she wasn't involved in any of that?

A. To my knowledge.

Q. To your knowledge, she was not at all?

A. No.

Q. The company that -- or the business that you would call, that was Professional Limousine Service, was it not?

A. Yes.

Q. And, in fact, that was a regular

V E R O N I C A B A K E R ,

called as a witness, having been first duly sworn by The Clerk, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. HOWARD:

Q. Ms. Baker, would you introduce yourself, please?

A. I am Special Agent Veronica Baker. I work with the Drug Enforcement Administration.

Q. And how long have your been employed with the D.E.A.?

A. Oh, about 13 years.

Q. Ma'am, I would like to ask you if you were working with D.E.A. in October, 1987.

A. Yes.

Q. And what were your duties then?

A. I was in the Washington Field Division. I was assigned to work undercover on the James Edward Smith case.

Q. During the -- how did you go in with the government?

A. I was introduced as a friend and classmate of the informant, Gay Chauvinist.

Q. Is that DeVoyce Gay Chauvinist?

A. Yes.

Q. DeVoyce is her first name?

A. DeVoyce.

Q. During the course of this, did you end up meeting James Edward Smith?

A. Yes, I did.

Q. i would like to ask you if he is present today?

A. Yes, he is.

Q. Would you please point him out?

A. He is sitting in a gray

suit with his hands to his face, and he wears glasses.

MR. HOWARD: If the record could reflect an identification of the defendant.

THE COURT: It will so reflect.

MR. HOWARD: Thank you.

BY MR. HOWARD:

Q. Who did you determine Gay Chauvinist was? At that point, who was Gay Chauvinist supposed to be, I mean, before she became an informant?

A. She was one of the violators we were working on, and she was also a friend of James Edward Smith.

Q. Did you at some point get to meet Mr. Smith?

A. Yes, I did.

Q. And do you remember approximately when that was?

A. It was in the beginning of

November, 1987.

Q. And how did you meet him?

A. I met him at the informant Gay's house.

Q. Could you determine exactly why he was coming over at that point?

A. When he was coming over, it was usually to bring heroin. And then on -- I would work with Gay, and Gay would speak to him on the phone and tell him what I wanted, and he would bring the heroin.

Q. Did there ever come a point when you and Mr. Smith actually had an exchange of any sort, either narcotics, or money for narcotics?

A. Yes. I had seen him a few times, and, then, finally on December 23, 1987, I had an opportunity to give him money as payment for some heroin I had received.

Q. And how did that transaction go down, ma'am?

A. I was in Gay's house, and Smitty came in, and after the informant Gay told me, "Ronnie, get the money," I went into the bedroom and got the money and came out. I handed it to Mr. Smith.

Q. And how much money did you hand him?

A. It was $3,955.

Q. Do you know what that money was supposed to be for? What it was --

A. That was payment for a previous package of heroin we had received.

Q. Okay.

And did you designate that heroin as Exhibit 18?

A. Yes, I did.

Q. I would like to show you Government's Exhibit 75.

MR. HOWARD: Your Honor, I have talked to Mr. Dunham. We will have a stipulation as to all the drugs involved

with Ms. Chauvinist, but this is D.E.A. 74, Governments Exhibit 18.

THE COURT: All right.

BY MR. HOWARD:

Q. Is that the lab report for that exhibit?

A. Yes, it is.

Q. Did you have another exchange after that?

A. Yes, we did.

Q. Can you tell the members of the jury when that exchange took place?

A. It was the following month. It was about January 21. I had been waiting for Smith to call at the informant's house. Finally, he called. Finally, he said he had it for me around the corner and for me to meet him at the hospital.

Q. What happened when you went around the corner to the hospital?

A. I left the informant's

house. I walked two and a half blocks to the hospital in a parking area. Smitty drove up. I got in the car. He handed me a brown paper bag. We drove back. I looked in the bag. The heroin was in there. I asked him if he could give me any bags. He said everything was there.

Q. When you said, "Any bags," what were you talking about?

A. Little plastic bags, that you package the heroin in quarters.

Q. I would like to show you what has been marked as Government's Exhibit 76. Is that the exhibit you picked up on -- a lab report of the exhibit you picked up on January 21?

A. Yes, it is.

Q. Ma'am, regardless of the identification, are these the sorts of bags that he had asked for -- you had asked for?

A. Yes.

MR. HOWARD: Your Honor, I will mark the bag I showed her as Government's Exhibit 81.

THE COURT: All right.

BY MR. HOWARD:

Q. Did you end up paying him for your Exhibit 22?

A. Yes. I paid about a week later.

Q. And how much did you pay him, do you remember?

A. I think a little over $4000. About $4,860.

Q. Did you have another exchange with him the following that payment?

A. The next month.

Q. February 1?

A. February 1, yes.

Q. Can you tell the members of the jury what happened on that day?

A. I was, again, in the

informant's house. Smith called. He said he was on his way over. I went downstairs to meet him. I met him in the vestibule of the C.I.A.'s building. He gave me some heroin. We talked about a future buy. I told him I wanted to double up on the amount and that I would pay him next time.

Q. And did you -- and what did you actually get from him?

A. I got heroin again.

Q. Okay.

I would like to show you what is marked as Government's Exhibit 23. Is that the drugs from that exchange?

A. Yes.

Q. Did you arrange at that point to meet him again?

A. i was going to meet him about a week later on February 6.

Q. And how was that arrangement made?

A. I told him that -- it was a

Saturday, and I needed to double up on the amount. He asked me if I -- we talked about the package, and I told him to put it all in one package, that I needed to have it early because out of town.

Q. Did you end up meeting him on that day?

A. Yes, on February 6.

Q. What happened?

A. He called. We knew that we were going to arrest him that day. I had some of my other investigators in the C.I.A.'s apartment. When he called, we told him to come on up, and he did. He was placed under arrest when he went into the apartment.

Q. When he was placed under arrest, was he searched?

A. Yes. In his pocket, he had a large quantity of heroin.

Q. I would like to show you what has been marked as Government's

Exhibit 78. Do you recognize that?

A. Yes.

Q. Is that the lab report of the heroin you found in his pocket?

A. Yes, it is.

A. Approximately nine years.

Q. I would like to ask you if you were working on August 22, 1985.

A. Yes, I was.

Q. First of all, in the year 1985, can you tell the members of the jury what your duties were?

A. I was in undercover police officer.

Q. And at some point in 1985, did you find yourself at a limousine service known as C.P.I., Champagne Productions, Incorporated, looking for a car?

MR. DUNHAM: Your Honor, we have an objection to this line of questioning, particularly with regard to Champagne Productions. I just want to state it for the record.

THE COURT: All right. Proceed.

MR. GETTINGS: And our prior objection we had for everything before.

THE COURT: That continues on. Proceed.

MR. GETTINGS: Thank you.

BY MR. HOWARD:

Q. Can you tell the members of the jury what happened while you were at C.P.I.?

A. I was there to purchase a car, to lease a car.

Q. And did anything happen during the time you were there?

A. Yes. I met Mr. Smith.

Q. And what is his full name, please?

A. James Edward Smith.

Q. Did you know Mr. Smith?

A. At the time, I knew about him, yes.

Q. Is he present today?

A. Yes, he is.

Q. Could you please point him out?

A. The gentleman sitting there with

the gray stripped suit with the glasses.

MR. HOWARD: Your Honor, if the record will reflect an identification of the defendant James Edward Smith.

THE COURT: It will so reflect.

BY MR. HOWARD:

Q. What happened after you met him?

A. We exchanged beeper numbers and we kept in touch.

Q. And why did you exchange beeper numbers? What was the purpose of that, do you know?

A. Hopefully, to eventually purchase drugs from Mr. Smith.

Q. Did you two start developing a business relationship of some sort?

A. Yes.

Q. And did that include lunches?

A. Yes, that's correct.

Q. Okay.

What was -- what exactly were

you trying to do for him, or what was he going to do for you? What was your understanding?

A. At the time, I was posing as someone that was running money for another organization, and I confronted him with that.

Q. Can you tell the members of the jury whether on August 22, 1985, you and Mr. Smith ate lunch at the Red Lobster in Prince George County, Maryland?

A. Yes, we did.

Q. And during that discussion, can you tell the members of the jury whether your discussion at some point turned to narcotics trafficking?

A. Yes, it did.

Q. Were you carrying any special devices with you at that point?

A. Yes, I was wearing a body wire.

Q. The body wire, did it actually make a recording?

A. Yes, it did. It recorded the conversation that Mr. Smith and I were having.

Q. And have you listened to that recording recently?

A. Yes.

Q. Was there a transcript made of it?

A. Yes, there was.

Q. And have you reviewed that transcript?

A. Yes, I have.

Q. At some point, did Mr. Smith indicate to you his ability to get into narcotics, different sorts of narcotics?

A. Yes.

Q. Can you describe for the jury exactly what you two talked about?

A. Mr. Smith and I talked about the fact the he used to be into drugs, and how he learned a lesson at one point. He had lived in an apartment, and the night

before he had moved his drugs out of that place, the police had actually raided the place the next day, and that is how he learned his lesson that you don't leave your drugs, I guess, basically where you live.

Q. I would like to, if I could, direct your attention -- do you have a copy of the transcript with you?

A. Yes.

Q. -- to page 11 of that transcript.

MR. DUNHAM: Your Honor, I would like to object. If we could approach side bar, I would like to explain my objection.

THE COURT: All right.

(Side bar conference)

MR. DUNHAM: Your Honor, we moved in advance of trial pursuant to Rule 16 for all the statements of defendant Smith that the government was going to use

in this case, and these -- this recording was not furnished to us in advance of trial.

MR. HOWARD: Yes, it was.

MR. DUNHAM: There was material furnished to us, about three feet worth of material furnished to us in connection with our motion for a dismissal of Count 1, but the material that was furnished to us as statements of the defendant that the government was going to use at trial was a separate delivery, it was not contained -- it was submitted to us at a completely different time.

It corresponds to a specific discovery request for statements of the defendant recorded, or otherwise, that you intend to use at trial, and this material was not among that material. It is very difficult to respond to a statement that I didn't know the government was going to use. I don't even have a copy of it with

me.

MR. HOWARD: Your Honor, I took a separate stack of recordings that I found in the District of Columbia. If I remember, I stacked them together, and I sent them to him. There were tons of recordings involving James Edward Smith. I gave them to him separately. I guess what Mr. Dunham is asking me to do is duplicate everything I have done and resubmit them.

THE COURT: But at one point in time, a transcript of this was submitted to him for review?

MR. HOWARD: Yes, sir.

THE COURT: All right.

MR DUNHAM: I am not disputing that, your Honor, but what I am saying is it was not presented to me for --

THE COURT: Fine. Your objection is overruled. Your position is

now a matter of record.

(End of side bar conference)

BY MR. HOWARD:

Q. In reviewing the transcript, page 11, did Mr. Smith at some point talk to you about his ability to, being out of narcotics now as he represented, getting back into it, you know, or anything else?

A. That's correct.

Q. Could you please tell the members of the jury based on the page 11 what the conversation was about there, please?

A. The conversation basically was about that Mr. Smith did "boy" at one point, which is heroin, and anyone that knew that you could do one can do the other, which was cocaine, which is "girl."

Q. At one point, did he tell you about whether he had seen pure heroin and his ability to work with a drug that is 100 percent pure?

A. He indicated to me that 100 percent heroin would take at least a 30 or 40 cut.

Q. When you say a 30 or 40 cut, what does that mean?

A. Which means you can basically mix it or dilute it to stretch it.

Q. Some 30 or 40 times; is that correct?

A. Yes.

Q. If you could turn to page 44, at some point did he talk to you about houses and where he keeps his narcotics versus other places?

A. Yes.

Q. And did you review a tape of that portion of the conversation?

A. Yes, I did.

MR. HOWARD: Your Honor, the government will not play the entire tape because it is very lengthy. This is approximately a two minute version, and I

would like to show Ms. Lyles Government's Exhibit 73.

BY MR. HOWARD:

Q. Is that an excerpted portion of your conversation with the defendant James Edward Smith on August 22, 1985?

A. Yes.

Q. I would like to also show you a copy of Government's Exhibit 74. Do you recognize Exhibit 74?

A. Yes.

Q. Is that an accurate reflection of the conversation as you remember it?

A. Yes, it is.

MR. HOWARD: Your Honor, with the Court's permission, we will pass out those transcripts.

MR. MCCLURE: I ask that everybody turn their headsets back on, which requires you to turn that switch to the right.

(Whereupon, a tape was played)

BY MR. HOWARD:

Q. Ms. Lyles, during that tape wherein -- on the first page where it indicates Mr. Smith had gone to make a telephone call, there was some two voices apparently over radio. Can you tell the members of the jury what that was?

A. What that was was there was a receiver in one of the cars outside that was monitoring, you know, this transaction, and what was going on. What they had done was actually taken a small portable taperecorder and actually put over the top of the receiver, so what you heard was the background sound of other cars in the area, police cars that were monitoring this, transmitting over their radio.

Q. You said, "this transaction." There was no exchange?

A. No. No. It was nothing like that. It was just a meeting.

Q. When you say police cars, you were being surveyed; is that correct?

A. Oh, yes.

Q. This conversation with Mr. Smith, what did you understand it to mean?

A. I understood it to mean that Mr. Smith had drugs in his place at one point, and what had happened just before he moved --

MR. DUNHAM: Your Honor, I object. We have heard the conversation. It means what it means. What it means to her is irrelevant.

THE COURT: The objection is sustained. Proceed.

Q. And have you been in the Richmond area that entire time?

A. Yes, all my life.

Q. Have you ever purchased heroin from James Edward Smith?

A. Yes, I have.

Q. Can you tell the members of the jury when you started purchasing heroin from James Edward Smith?

A. About 1969 or 1970.

MR. DUNHAM: Your Honor, may we have an objection to this on the grounds that we have stated?

THE COURT: Yes. You have a continuing objection.

MR. GETTINGS: I have a continuing objection?

THE COURT: Yes.

MR. GETTINGS: Thank you.

BY MR. HOWARD:

Q: How long have you been purchasing?

A. Since about 1969 or 1970.

Q. Can you tell the members of the jury how you started with you cousin?

A. I didn't get started with him, I got started with someone else.

Q. Who was that?

A. This guy name Ray James. This was back in 1968.

A. How did come to start buying drugs from your cousin Smitty?

A. Well, he gave me a better price.

Q. Where was Smitty selling drugs at that time?

A. Out of Washington.

Q. And when you needed to get drugs from Smitty, how would you go about it in that time period, 1969 through the 1970's?

A. 1969 to 1970? I used to go up and get it myself then.

Q. And how much were you

purchasing from him?

A. At that time?

Q. Yes.

A. Probably an ounce.

Q. At a time?

A. At a time.

Q. How much were you paying for an ounce at that time?

MR. GETTINGS: Your Honor, may I object on the grounds of relevance because of the remoteness in time?

THE COURT: Yes. The objection is overruled. Proceed.

BY MR. HOWARD:

Q. How much were you paying for heroin at that point?

A. About $600.

Q. At some point, did you -- you said at that time you were going up to get the drugs. Would you actually drive from Richmond to D.C.?

A. I would go from Richmond to

D.C.

Q. How would you locate Mr. James Edward Smith?

A. Call him on the phone. Call him on the beeper.

Q. Did you know where he lived?

A. He had more than one house. I found him -- I would stay up there until I found him.

Q. Were you able to drive right to where he worked, or where he lived in order to buy your heroin at that point?

A. No. Not to where he worked or lived at.

Q. At some point, did you have to -- did your method of operation change? Did you start buying heroin from him in a different manner? Were people bringing heroin down to you at some point?

A. Oh, yes.

Q. When did that start?

A. That probably started in the late 1970's or early 1980's.

Q. Can you describe for the jury exactly how you were buying heroin from Mr. Smith in the late 1970's or 1980's?

A. how was I buying it? Do you mean how much?

Q. No. How would you get it?

A. Oh. I would call on his beeper and he would bring it down or have it sent down.

Q. Okay.

And who were the people who brought it down?

A. Alexander Trent was one of them.

Q. Alexander Trent?

A. Yes.

Q. Do you know him as Buddy?

A. Buddy, yes.

Q. Anybody else that brought it down?

A. No. Nobody else that I recall.

Q. How would you actually get it? How would you actually go up to tell him that you needed heroin?

A. I would go up and call him on the beeper and tell him what I want.

Q. Can you tell the members of the jury, if you would, at that point, how much heroin you were buying from him at a time? In the late 1970's and 1980's.

A. I was buying maybe four ounces at a time.

Q. And how much were you paying for four ounces?

A. $5,000.

Q. How often were you buying that quantity?

A. Maybe once every couple of months, every two or three months.

Q. And what were you doing with that heroin?

A. Selling it.

Q. And where were you selling?

A. Selling it to Titi.

Q. Here in Richmond.

A. In Richmond.

Q. Did you have a normal stream of customers?

A. Yes, I had a normal stream of customers.

Q. Who else was buying heroin from James Edward Smith at that point?

A. My cousin, Charles Smith. My brother.

Q. What is your brother's name?

A. Raymond Smith.

Q. Does Charles Smith go by the name of Dickey?

A. Yes, by Dickey.

Q. And does Raymond Smith go

by the name of Buck?

A. Yes, Buck.

Q. How did you know Dickey was buying heroin from Smith?

A. I think he told me.

Q. Did he indicate to you how he was getting his heroin? Did you know? How would he go about getting it?

A. He would go by the same way I did, go up there and look for him. He would go get it sometimes himself.

Q. And how about Buck? How was Buck buying his heroin at that time?

A. Same way. He was also buying it the same way.

Q. Do you know how much they were buying from him?

A. Maybe Buck may not buy but an ounce at time.

Q. Who else were you getting heroin from?

A. Who else was I getting

heroin from?

Q. Were you getting heroin from anybody else?

A. Yes. I got some heroin out of New York from a guy named -- I can't recall his name, but I did get some from a guy out of New York.

Q. How many times was that?

A. About twice. The dude is dead now.

Q. Anybody else that you have purchased heroin from?

A. No.

Q. Do you know where James Edward Smith was purchasing his heroin from at that period?

A. Do I know where he was purchasing?

Q. Yes.

A. No, I do not.

Q. Did you ever ask him?

A. No, I never asked him.

Q. Did you ever try to learn?

A. I wanted to know, but I know he wouldn't tell.

Q. Why do you know he wouldn't tell you?

A. Because he really probably didn't want me to get it from nobody, from his people.

Q. When you say, "his people" ---

A. The people who he gets stuff from.

Q. Do you know who Richard Leander Smith is?

A. Richard Leander Smith? Yes. He is my cousin.

Q. I would like to ask you if he goes by a nickname?

A. Peter.

Q. Is he here?

A. (Indicating)

MR. HOWARD: Your Honor, if

the record would reflect an identification of the defendant Richard Leander Smith.

THE COURT: It will so reflect.

BY MR. HOWARD:

Q. Can you tell the jury how often -- whether Richard Leander Smith was buying drugs from Smitty?

A. Yes.

MR. BENJAMIN: Objection to hearsay, your Honor.

THE COURT: Pardon?

MR. BENJAMIN: Objection to hearsay.

THE COURT: The objection is overruled. Proceed.

BY MR. HOWARD:

Q. Do you know if he was buying from James Edward Smith?

A. Yes. He said he was -- yes. I know he was getting it. He told me he was getting it from him.

Q. Could you tell us how much he was getting from him?

A. Probably an ounce at a time.

Q. At some point in 1988, did you learn that James Edward Smith had been arrested?

A. Yes, I did.

Q. Do you remember the date of that?

A. No, I don't know the date. I know it

A. Around the year 1972, somewhere around there.

Q. And can you tell the members of the jury how you got started?

A. By delivering drugs.

Q. And who were you delivering drugs for, sir?

A. For James Smith.

Q. That is James Edward Smith.

A. Yes, James Edward Smith, yes.

MR. GETTINGS: Excuse me. Same objection, your Honor.

THE COURT: All right.

BY MR. HOWARD:

Q. Do you know James Edward Smith?

A. Yes, I do.

Q. How do you know him?

A. We is cousins.

Q. Is he present today?

A. Yes, he is.

Q. Can you point him out, please?

A. Right on the end over there.

MR. HOWARD: Your Honor, if the record would reflect an identification.

THE COURT: The record will so reflect.

BY MR. HOWARD:

Q. He goes by the name of Smitty, is that correct?

A. Yes, he does.

Q. And you go by the name Dickey?

A. Yes.

Q. You said you were delivering drugs. Where would you get the drugs? Where would you pick them up and in which city?

A. Washington, D.C.

Q. Were you living up there at the time?

A. At the time, I was.

Q. And where would you deliver them to?

A. To Richmond.

Q. Do you know who in Richmond you were delivering to?

A. To a couple of people.

Q. Who were they?

A. There was some to Scank Smith.

Q. That is James Reginald Smith?

A. James Reginald Smith, yes.

Q. Do you know James Reginald Smith?

A. Yes, I do

Q. How do you know him?

A. He is some kin to me, too.

Q. Who else would you deliver to?

A. The other fellow, I can't recall him now.

Q. Okay.

How long were you delivering drugs for James Edward Smith?

A. I just did it about a couple of times.

Q. At some point, did you move up in the business?

A. Yes, I did.

Q. And what did you start doing?

A. I started selling drugs myself.

Q. When you say, "Drugs," was there a particular type of drug you were selling?

A. Heroin.

Q. And when did you start selling?

A. Oh, about 1974, something like that.

Q. And how long did you sell?

A. On and off, up until the time I got arrested.

Q. Okay.

From 1975 -- how long were you selling at that point in the District of Columbia?

A. No. I never sold drugs in the District of Columbia.

Q. What were you doing in the District of Columbia from 1972 to approximately 1984?

A. I wasn't up there that long. I was up there from 1972 to 1978.

Q. Were you running drugs at that point, from 1972 to 1978?

A. No, I wasn't.

Q. In 1978, what happened in 1978?

A. I moved back down here to Richmond.

Q. And when you moved back down to Richmond, what happened then?

A. I started selling drugs.

Q. And who were you selling -- who were you getting your drugs from?

A. From James Edward Smith.

Q. When you were down here in Richmond, how would you get your drugs from James Edward Smith?

A. I would go up there and get them.

Q. How did you find him? How did you know to find him?

A. I would call him before I go,

and we would meet some place.

Q. Did you know where he lived?

A. Yes, I knew where he lived.

Q. And you would pick up those drugs and bring them back down to Richmond; is that correct?

A. Yes, sir.

Q. How long were you selling in Richmond?

A. Up until 1984.

Q. And then what happened in 1984?

A. I got in trouble.

Q. And what kind of trouble did you get into?

A. For drugs.

Q. Did you get arrested?

A. Yes, I did.

Q. And did you serve any time?

A. I served about seven months.

Q. And what charges were you on?

A. Combination.

Q. Was that in the City of

Richmond?

A. Yes, it was.

Q. After that, did you end up moving to the District of Columbia?

A. Yes, I did.

Q. When was that, sir?

A. In 1984.

Q. Okay.

How long were you in the District of Columbia?

A. I stayed up there from 1984, 1985 -- last part of 1984 until the middle part of 1986.

Q. When you were in the District of Columbia, did you continue in the narcotics trade?

A. Yes, I did.

Q. Can you tell the members of the jury what you were doing during that period that you were in the District of Columbia?

A. I was selling drugs.

Q. Where were you getting your drugs from?

A. From James Edward Smith.

Q. How much were you getting and how often were you getting it?

A. I was getting about a half an ounce at that time.

Q. About how often?

A. About once every other week.

Q. And what were you doing with those drugs?

A. Bringing them back to Richmond and selling them.

Q. Were you getting drugs from anybody else?

A. No, I wasn't.

Q. Did you eventually leave the District of Columbia?

A. Yes, I did.

Q. Can you tell the members of the jury when that was?

A. About the last part of 1986.

Q. And where did you come?

A. Back to Richmond.

Q. And what were you doing down here?

A. Selling drugs.

Q. And once again, drugs are heroin?

A. Heroin.

Q. When you were selling these drugs down here in Richmond, was James Edward Smith again your source?

A. I started getting them from James Reginald Smith when I moved back to Richmond.

Q. Okay.

Why did you stop going to James Edward Smith?

A. He just cut me off.

Q. Do you know why he cut you off?

A. I believe because James Reginald Smith wasn't doing too good to him.

Q. When you said he wasn't doing

too good, what do you mean?

A. He wasn't selling that much drugs to survive, I guess.

Q. Do you known anybody else who was purchasing drugs from James Edward Smith?

A. I know some people that was getting drugs from him, but I never seen him give it to them.

Q. Has anybody ever told --

MR. GETTINGS: Your Honor, we will object to this. This is pure hearsay.

THE COURT: The objection is overruled. Proceed.

BY MR. HOWARD:

Q. Did anybody ever tell you that they were buying drugs from James Edward Smith?

A. Yes.

Q. Who would those people be?

A. James Reginald Smith.

Q. Anybody else?

A. Raymond Smith.

Q. Is that Raymond Luther Smith?

A. Raymond Luther Smith, yes.

Q. What is his nickname?

A. We called him Buck.

Q. Anybody else?

A. No.

Q. How about Richard Leander Smith?

MR. BENJAMIN: I object to the leading.

THE WITNESS: I don't know if he got anything from him or not. He never told me he got anything from him.

BY MR. HOWARD:

Q. That's fine.

Sir, the drugs that you obtained during this period, 1986 to the time of your arrest, what were you doing with them?

A. Selling them in Richmond.

Q. Was somebody helping you sell

them?

A. The persons who were dealing for me.

Q. And the people that were dealing for you, where were they selling?

A. Out in the Creighton Court project.

Q. How many people did you have selling out there?

A. I had one at a time selling for me.

Q. How many different people sold for you during this period?

A. About three or four different people.

Q. I would like to ask you to what extent you were the boss of anybody. Who were the people that you controlled?

A. What do you mean by "control."

Q. Who were the people that you gave drugs to?

A. Lawrence Brown was one of them.

Q. Anybody else?

A. A girl named sheila.

Q. Anyone else.

A. A boy name Tony Merritt.

Q. Anybody else that you can think of?

A. That's all I can think of right now.

Q. Did you consider yourself managing or controlling James Reginald Smith?

A. Managing James Reginald Smith?

Q. Yes, sir.

A. No, I haven't. No.

Q. Did you consider yourself managing or controlling James Edward Smith?

A. No, sir.

Q. How about Richard Leander Smith?

A. No, sir.

Q. Sir, was it your understanding that in February, 1988, that James Edward

Smith was arrested?

A. Yes, I remember.

Q. And how did you learn that?

A. Somebody called down here and told all of us about it.

Q. And did you ever -- after he was arrested, did you have an opportunity to visit with him?

A. While he was in prison, yes, when he was locked up.

Q. And where did you go to visit with

BY MR. HOWARD:

Q. Can you tell the members of the jury how you know James Edward Smith?

A. I met him some years back, 20 years back.

Q. And how did you meet him?

A. Just on occasion, just out in the street.

Q. The two of you had become fairly close social friends?

A. That's correct.

Q. And does he enjoy status in your family?

A. He is the godfather to my son.

Q. Mr. Alexander, let me digress. You are also known by a nickname, is that correct?

A. Yes, Buddy.

Q. Can you tell the members of the jury whether at some point you were working for Mr. James Edward Smith.

A. The latter part of 1979 and the

first part of 1980.

Q. And what were you doing for him?

A. I was making deliveries for him.

Q. When you say "deliveries," deliveries of what, sir?

A. Heroin.

Q. Where were you making -- where would you pick up the deliveries?

A. From Mr. Smith.

Q. And where would you take them to in Richmond?

A. Scank.

Q. Is that James Reginald Smith?

A. James Reginald Smith.

Q. Anybody else?

A. Yes, Peter.

Q. Is that Richard Leander Smith?

A. That is correct.

Q. Do you know if Richard Leander Smith is here today?

A. Yes, he is.

Q. Could you please point him out?

A. (Indicating)

MR. HOWARD: Your Honor, if the record would reflect an identification of defendant Richard Leander Smith.

THE COURT: It will so reflect.

MR. DOHNAL: Your Honor, excuse me. Could the witness please raise his voice?

THE COURT: Yes, Mr. Alexander, speak into the microphone, if you will. Marshal, adjust it so that he will be speaking into it directly.

BY MR. HOWARD:

Q. Approximately how many deliveries did you make for James Edward Smith to the Richmond area.

A. Once or twice a year.

Q. Was there anybody else that you delivered to in Richmond besides the two gentlemen that you have identified?

A. No.

Q. Did you deliver at all in the District of Columbia area?

A. No.

Q. You are, in fact, a resident of the State of Maryland?

A. That's correct.

Q. Did you make any deliveries in the Maryland area?

A. No, I did not.

Q. What did you get in return for making these deliveries?

A. The sum of a couple hundred dollars, $2- or $300.

Q. Did you ever buy heroin from Mr. Smith for your own personal use?

A. No, I did not.

Q. Who did you buy your heroin from?

A. Off the street.

Q. Do you know any of the names of people you bought from off the street?

A. No, I do not.

Q. You do know the name Gay Caviness?

A. Yes, I do know Gay.

Q. Did you ever buy heroin from her?

A. Yes, I have.

Q. Do you know what her relationship is to James Edward Smith?

A. Friend, as far as I know.

Q. Do you know where she got her heroin?

A. No, I can't say where she got her heroin.

Q. Do you know anybody else besides Mr. Peter Smith and Mr. James Reginald Smith who purchased heroin from -- I mean, besides Peter Smith and Scank Smith that purchased heroin from James Edward Smith?

A. No, I do not.

Q. Do you know who else worked for him, ran for him, took orders from him?

A. No, I do not.

Q. At some point -- how long did you deliver drugs for him?

A. Once or twice a year. Like I said, the latter part of 1979, first part of 1980.

Q. Did you stop at that point?

A. Yes.

Q. After 1980, did you deliver any more?

A. Yes. I guess about 1985, or so.

Q. Were you doing anything else besides delivering drugs?

A. No, that was all.

Q. Do you remember ever cutting drugs with Smith, helping him package it?

A. Yes, when I first met him.

Q. And that was 1979?

A. No, that was 20 years ago.

Q. That was 20 years ago?

A. Yes.

Q. Well, 20 years ago when you first met him, what were you doing other

than courier?

A. I was cutting with him.

Q. When you say "cutting," what were you doing?

A. Cutting the heroin.

Q. When you say "cutting," what does that mean?

A. Mixing it up, putting mixtures.

Q. Were you familiar with that process, or did you come familiar with it?

A. I became familiar with it.

Q. How many times did you do that with him?

A. A couple of times. I can't remember counting.

Q. A couple of times 20 years ago and that was the last time you did it?

A. Yes.

Q. Did you, at some point, learn that Mr. James Edward Smith became -- was arrested?

A. Yes, I did.

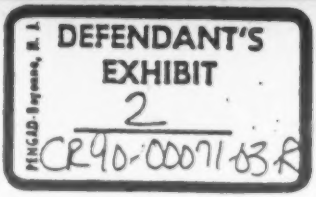
Q. And do you remember the day being February 6, 1988?

A. Yes. Yes, I do.

Q. After you learned that he was arrested, did -- were you ever contacted by

MR. DUNHAM: Your Honor, if Mr. Howard wants a stipulation that Mr. Smith was a drug dealer, that he was dealing drugs, and that he was convicted in the District of Columbia in 1988, he has got it. I mean, that is not what the issue is here.

The issue is he wants to try the District of Columbia case in Technicolor, and it comes so late and so close to trial. He talks about the Blackwell case that the prosecution decided to use the evidence from the other drug case less than one business day before the trial was supposed to begin.



Mrs Smith

It is very important that Richard Leander Smith contact me As soon as possible. He will be able to solve himself some serious problems by talking with us. I can be reached at 355-7360 or digital pager 783-3603. You can call if you have any questions. Thank you

Detective Sergeant Don Carter
Organized Crime Heroin Task Force

Supreme Court, U.S.
FILED
JAN 6 1993
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No. 92-631

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES EDWARD SMITH ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause was violated when the government introduced evidence at trial under Fed. R. Evid. 404(b) concerning petitioner James Smith's participation in a prior drug conspiracy, for which he had previously been convicted.

2. Whether the district court properly admitted evidence of petitioner James Smith's prior drug trafficking activities.

3. Whether the district court erred in not submitting the issue of the voluntariness of petitioner Richard Smith's confession to the jury.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10), is unpublished, but its judgment is noted at 966 F.2d 1446 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1992. On August 25, 1992, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari until October 8, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of interstate travel to promote drug trafficking, in violation of 18 U.S.C. 1952(a); possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and use of a telephone to facilitate drug trafficking, in violation of 21 U.S.C. 843(b). Petitioner James Smith (James) was also convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g), and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner Richard Smith (Richard) was also convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846, and distribution of cocaine and heroin, in violation of 21 U.S.C. 841(a)(1). James was sentenced to a total of 384 months' imprisonment, ten years' supervised release, and a $575,000 fine. Richard was sentenced to 121 months' imprisonment and five years' supervised release. The court of appeals affirmed. Pet. App. 1-10.

1. James operated a drug trafficking organization in the District of Columbia and Virginia. On February 6, 1988, he was arrested for drug trafficking and jailed in Alexandria, Virginia. While in jail, James directed Richard, Reginald Smith, Excel Alexander, and others to remove drugs, drug paraphernalia, weapons, and money from James's safe houses in the District of Columbia. The drugs and the firearms were subsequently stored in commercial warehouses in Richmond, Virginia. Gov't C.A. Br. 3.

Reginald Smith distributed heroin to Richard for resale, but the heroin did not sell because it was of

poor quality. As a result, Richard became deeply indebted to Reginald. In 1988, James, then incarcerated in the federal prison in Petersburg, Virginia, directed an accomplice to deliver additional heroin to Reginald Smith for resale. In 1989, Richard purchased cocaine from a new dealer. Thereafter, he distributed heroin and cocaine to some friends. In the fall of 1989, federal agents seized heroin, cocaine, other drugs, and firearms from a commercial warehouse controlled by Reginald Smith. Later, Richard admitted to law enforcement agents that he had sold cocaine and heroin. Gov't. C.A. Br. 4-5.

2. In March 1988, James pleaded guilty in the U.S. District Court for the District of Columbia to the charge of conspiring to distribute narcotics between 1979 and 1988. The instant indictment initially charged both James and Richard with conspiring to distribute heroin, but the district court dismissed that charge as to James on double jeopardy grounds. *United States* v. *Smith*, 759 F. Supp. 304 (E.D. Va. 1991). At trial, the district court permitted the government to present evidence of James's drug trafficking activities during the period covered by the District of Columbia conspiracy charge. First, Excel Alexander, who testified that James had directed him to remove incriminating evidence from James's safe house following James's arrest, also testified that he had sold drugs for James since the 1960s and the 1970s. Second, Alexander and witness Reginald Smith testified that Richard had belonged to James's drug organization during the middle 1980s. Third, Detective Barbara Lyles testified that in 1985, James told her that he no longer stored drugs where he lived

because a police raid on one of his apartments had narrowly missed discovering drugs that were stored there. James also told her that he normally diluted his heroin.[1] The district court gave a limiting instruction to the jury with respect to the similar acts evidence that was admitted into evidence.[2] Gov't C.A. Br. 6-7.

3. The court of appeals affirmed. First, the court held that the admission of similar acts evidence against James did not violate the double jeopardy ban against a second prosecution for the same offense. The court explained that the use of James's prior drug crimes as evidence against him was not the same as prosecuting him for those prior acts. Pet. App. 3-4. It also held that the district court properly admitted petitioners' prior drug trafficking activities to show motive, intent, and common scheme or plan and that the trial court's limiting instruction kept that evidence confined to its proper bounds. Pet. App. 4-5. The court held that the district court properly did not instruct the jury on the voluntariness of Richard's confession because Richard did not raise the voluntariness issue before the jury.[3]

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[1] There was also testimony from Reginald Smith, Charles Smith, Devoyce Caviness, and DEA Agent Veronica Baker regarding James's prior drug trafficking activities. The district court, however, instructed the jury to disregard that evidence as to James Smith. C.A. App. 240-241.

[2] The court instructed "that these defendants are not on trial for any prior crimes or other misconduct that may have come out into evidence." C.A. App. 237-238.

[3] The court of appeals also rejected James's claims that he was improperly denied a severance (Pet. App. 5) and that the government improperly used his immunized testimony at trial

ARGUMENT

1. James Smith contends (Pet. 14-21) that the admission into evidence of his drug trafficking activities while participating in the conspiracy of which he had earlier been convicted violated the Double Jeopardy Clause. He relies on *Grady* v. *Corbin*, 495 U.S. 508 (1990), in which this Court held that the Double Jeopardy Clause bars a second prosecution if "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 510.

In *United States* v. *Felix*, 112 S. Ct. 1377, 1385 (1992), this Court reaffirmed "the established doctrine that a conspiracy to commit a crime is a separate offense from the crime itself," and that an individual may accordingly be prosecuted separately for a conspiracy and for substantive offenses that are named as overt acts committed in furtherance of that conspiracy. Thus, even if the specific acts for which James was prosecuted in this case had been named as overt acts in the conspiracy information to which he pleaded guilty, separate prosecution for those acts would not have been barred. Since the specific acts for which James was prosecuted in this case were not named as overt acts in the conspiracy information to which he previously pleaded guilty, the result in this

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(Pet. App. 6-7); Richard's claim that his confession was involuntary (Pet. App. 7-8); and petitioners' joint claim (Pet. App. 9-10) that the district court's final instructions were incorrect in several respects. Petitioners have not renewed those claims before this Court.

case follows *a fortiori* from *Felix*. Indeed, two of the five counts of which he was convicted involved acts that did not occur until April and May 1989, more than one year after his March 16, 1988, guilty plea. See Pet. App. 42, 44. Cf. *Garrett* v. *United States*, 471 U.S. 773, 790-793 (1985).

James argues (Pet. 19-21) that *Felix* is distinguishable because his conspiracy prosecution occurred before his prosecution on the substantive narcotics counts, while in *Felix* the defendant was first prosecuted for the substantive offense and then for the conspiracy. Nothing in this Court's reasoning in *Felix*, however, turns on the order in which the offenses were prosecuted. To the contrary, if two prosecutions charge a defendant with the same offense, the order in which they are brought has no bearing on the double jeopardy analysis. See *Grady*, 495 U.S. at 521 n.11; *Brown* v. *Ohio*, 432 U.S. 161, 168-169 (1977) ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").

2. James Smith next contends (Pet. 21-31) that the district court erred in admitting evidence of his prior drug trafficking activities under Fed. R. Evid. 404(b).

Under Fed. R. Evid. 404(b), evidence of a defendant's similar acts is admissible if "probative of a material issue other than character," *Huddleston* v. *United States*, 485 U.S. 681, 686 (1988); if "the jury c[ould] reasonably conclude that the act occurred and that the defendant was the actor," *id.* at 689; and if its probative value is not "substantially outweighed by the danger of unfair prejudice," *id.* at 687 (quoting

Fed. R. Evid. 403). Rule 404(b) provides that among the "issue[s] other than character" for which such evidence can be admitted are "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The district court did not abuse its discretion in admitting the similar acts evidence in this case. First, Detective Lyles's testimony that James had told her that a police raid had taught him not to keep drugs at his apartment was relevant because it showed James's motive in summoning his accomplices to his jail cell and directing them to remove his drugs and firearms from his safe houses. See *United States* v. *Wagoner*, 713 F.2d 1371, 1375-1376 (8th Cir. 1983). Detective Lyles's testimony about James's practice of diluting his heroin showed James's method of operation, which helped explain why the heroin that he sold to Reginald Smith was of such poor quality. See *United States* v. *Rawle*, 845 F.2d 1244, 1247-1248 (4th Cir. 1988); *United States* v. *Haynes*, 881 F.2d 586, 589-590 (8th Cir. 1989).

Second, Alexander's testimony that he had distributed drugs for petitioners in the past, and Reginald Smith's testimony that he had previously distributed drugs in partnership with Richard, was relevant because it showed the relationship of trust between the members of James's drug organization and thus buttressed the evidence that petitioner continued to deal with them. The relationship of trust between James and Alexander also explains why James selected Alexander to hide his drugs and firearms while he was in jail. See *United States* v. *Legendre*, 657 F.2d 238, 242 (8th Cir.), cert. denied, 454

U.S. 1037 (1981); *United States* v. *Dansker*, 537 F.2d 40, 58 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

The probative force of the above evidence was not substantially outweighed by the danger of unfair prejudice. The references to James's other crimes were brief and unremarkable. Moreover, the district court's limiting instruction confined the similar acts evidence to its proper purposes.[4]

James's argument (Pet. 27) that the similar acts evidence should have been excluded because he was willing to stipulate that he was a drug dealer is meritless. Although a district court should consider a defendant's willingness to stipulate in conducting the balancing process under Fed. R. Evid. 403, it is not required to force the government to forgo its evidentiary presentation by accepting a tactical stipulation by the defendant, particularly where the stipulation is not an adequate substitute for the proffered evidence with regard to the purposes for which the evidence is being offered. See *United States* v. *Allen*, 798 F.2d 985, 1001 (7th Cir. 1986); *United States* v. *Grassi*, 602 F.2d 1192, 1197 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980). Here, the proffered evidence showed James's methods of conducting his drug operation and his relationship with his co-conspirators, which was important in helping the jury understand the charges against him

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[4] James's contention (Pet. 26) that the testimony of Baker, the Smiths, and Caviness was improperly admitted overlooks the fact that the district court subsequently instructed the jury to disregard their testimony. The jury is presumed to have followed the court's instruction. See *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987).

and his conduct in committing the charged offenses. The stipulation that James was "a drug dealer, that he was dealing drugs, and that he was convicted in the District of Columbia in 1988," Pet. App. 128, would not have served as an adequate substitute for the evidence that showed James's modus operandi, his relationship of trust with particular individuals, and his motive for removing the drugs and firearms from his safe houses.[5]

3. Finally, Richard Smith contends (Pet. 32-37) that the district court erred by not submitting the

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[5] The Second Circuit follows the practice of requiring the district court to postpone admission of similar acts evidence offered to prove intent until rebuttal so as to determine whether the defendant, in his case, takes the issue of intent out of the case. See *United States* v. *Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980). Even the Second Circuit, however, finds no reversible error when the evidence is admitted during the government's case-in-chief and, as in this case, the defendant rests without presenting evidence. See *id.* at 939 n.1; *United States* v. *Williams*, 577 F.2d 188, 191 (2d Cir.), cert. denied, 439 U.S. 868 (1978). Petitioner's contention (Pet. 25) that similar act evidence may not be introduced "[u]nless and until [the defendant] dispute[s] the issue of intent" is contrary to this Court's recent decision in *Estelle* v. *McGuire*, 112 S. Ct. 475, 481 (1991), where the Court rejected the same argument and explained:

> [T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. In the federal courts "[a] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged." *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988).

issue of the voluntariness of his confession to the jury.

State police officer D.R. Carter went to Richard's home to seek his cooperation in the investigation of a related drug offense. Because Richard was not at home, Carter left a note on the front door that was addressed to Richard's wife and that asked Richard to contact Carter and stated that he "[would] be able to save himself some serious problems by talking with us." Several days later, Richard called Carter, who told Richard that he was under investigation, asked Richard to cooperate with him, and advised him to hire a lawyer. Richard then went to the FBI office, where he met with Carter and FBI agent Terry Carney. After they gave Richard his *Miranda* warnings and told him that he was not under arrest, Richard admitted that he had sold some heroin and cocaine during the summer of 1989. Pet. App. 7.

Prior to trial, Richard moved to suppress his confession on the ground that it was involuntary. He maintained that Officer Carter's note coerced him into confessing. After a hearing, the district court denied the motion and ruled that the confession would be admitted into evidence. Gov't C.A. Br. 14-15.

Section 3501(a) of Title 18 provides that a district court shall initially determine the issue of the voluntariness of a defendant's confession. If it concludes that the confession was voluntary, it shall admit the confession, and "shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." The court's duty to instruct the

jury on the voluntariness issue, however, arises only if the defendant actually raises the issue before the jury. If the defendant fails to raise the voluntariness issue before the jury, a voluntariness instruction is not required. See, *e.g.*, *United States* v. *Sebetich*, 776 F.2d 412, 422 n.16 (3d Cir. 1985) (collecting cases), cert. denied, 484 U.S. 1017 (1988); *United States* v. *Groce*, 682 F.2d 1359, 1365-1366 (11th Cir. 1982).

During the trial on the merits, Richard did not raise an issue of the voluntariness of his confession before the jury. During his opening statement, his counsel virtually conceded that his confession was voluntary. He explained that Richard had confessed to having sold small amounts of heroin and cocaine because he wanted to cooperate with the authorities, and he maintained that the government had indicted him because he refused to admit that he was a member of James's drug ring. C.A. App. 128-129.[6] During the defense case, Richard introduced Officer Carter's note into evidence, but he did not present any evidence that his confession was involuntary. During his closing argument, Richard's counsel contended that the government failed to prove that he had confessed, because it had not produced a tape recording of the confession, but he did not contend that the confession was involuntary. Gov't C.A. Br. 18-20.

Richard's contention (Pet. 36) that he raised the voluntariness issue by introducing Officer Carter's

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[6] Richard's counsel stated that Richard "told [the FBI] the truth" and that "[h]e cooperated." C.A. App. 128-129. Counsel also told the jury that Richard "didn't tell them what they wanted to hear" and "today, * * * he sits * * * indicted." *Id.* at 129.

note at trial is meritless. As his counsel's conduct at trial demonstrates, the note was introduced merely to show what prompted Richard to come to the FBI office to confess; Richard did not argue to the jury that the note showed that his confession was involuntary. In any event, the fact-bound question whether the court of appeals correctly apprehended the purpose for which the note was introduced does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1993